

Deprivation of Liberty Safeguards: an update for hospices

November 2014

The purpose of this briefing

This briefing is for all staff and volunteers providing hospice care as the people they support are likely to be protected by the Mental Capacity Act (2005) and the Deprivation of Liberty Safeguards (DoLS). This document has two purposes:

1. It highlights the importance of a recent Supreme Court judgement on care of people who may lack capacity to consent to the arrangements
2. Further to publication of a House of Lords Select Committee Report on the Mental Capacity Act 2005, this document sets out ways in which hospices may wish to get involved or influence subsequent activity, and what actions they can be taking.

Appendix 1 contains a timeline for the introduction of the Mental Capacity Act (MCA) and DoLS, and current work underway at a national level.

What are the Deprivation of Liberty Safeguards?

DoLS are part of the legal framework set out in the Mental Capacity Act. They apply to care homes and hospitals in England and Wales¹. The safeguards relate to people aged 18 years and over who lack capacity to consent to the arrangements for providing them with care or treatment.²

Note: For the purposes of DoLS the definition of a care home or hospital is derived from the Care Standards Act 2000 and includes one where *"the main purpose of which is to provide medical or psychiatric treatment for illness or mental disorder or palliative care"*³. DoLS will therefore apply to hospice inpatient units.

The MCA was introduced in 2005 to empower and protect people who may lack capacity to make some decisions for themselves. It makes clear who can take decisions in which situations, and how they should go about this. Anyone who works

¹ As we will cover later in this document, the settings in which deprivation of liberty can now occur have been widened by the recent caselaw.

² Ministry of Justice. [Mental Capacity Act 2005: Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice](#). London: TSO, 2008

³ [Care Standards Act 2000: section 2\(3\)](#)

with or cares for an adult who lacks capacity must comply with the MCA when making decisions or acting for that person.

At the heart of the MCA are five 'statutory principles', these are set out in detail at Appendix 2.

The Mental Capacity Act Deprivation of Liberty Safeguards (MCA DoLS), which came into force on 1 April 2009, provides a legal framework to ensure people are deprived of their liberty only when there is no other way to care for them or safely provide treatment. They were created to ensure that when a person is deprived of their liberty in a health or social care setting they have a means of challenging that detention, and also to ensure that any deprivation is carried out in the least restrictive way, and only if it is in that person's best interests. A deprivation of liberty must be appropriately authorised.

The [DoLS Code of Practice](#)⁴ provides further and more detailed explanation of the safeguards and sets out factors which may indicate that a person is being deprived of their liberty. There has been, however, no statutory definition of a 'deprivation of liberty', and so determination of whether the safeguards are required has to be determined on a case by case basis.⁵

Interpretation of the legislation has therefore varied widely nationwide, leading to local variation in policy and processes, and making the implementation of the safeguards inconsistent.⁶ The challenge of interpreting what is meant by a deprivation of liberty has made it difficult even for experts in this field to consistently reach the same decisions.⁷

What has changed?

On 19 March 2014, the Supreme Court handed down a judgement in what has become known as the 'Cheshire West' case⁸. The judgement set down criteria for determining whether the care and/or treatment arrangements made for a person lacking capacity to consent to those arrangements amount to a deprivation of liberty.

The judgement was significant for two reasons.

1. The Supreme Court held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This

⁴ Ministry of Justice. [Mental Capacity Act 2005: Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice](#). London: TSO, 2008

⁵ Mental Capacity Act section 64 (5).

⁶ [Health and Social Care Information Centre Mental Capacity Act 2005, Deprivation of Liberty Safeguards Assessments, England - 2012-13, Annual report \(2013\)](#)

⁷ [R Cairns et al. Judgement about deprivation of liberty made by various professionals: comparison study The Psychiatrist 2011; 35: 344-9.](#)

⁸ The cases involved were: [P v Cheshire West and Chester Council and another and P and Q v Surrey County Council](#). A summary is also [available](#).

will include a placement in a supported living arrangement in the community. (so applies not only in a care home or hospital setting)⁹

2. The Supreme Court lay down an “acid-test” of circumstances that are likely to amount to a deprivation of liberty; namely that:
 - *‘the person is under continuous supervision and control and*
 - *is not free to leave, and*
 - *the person lacks capacity to consent to these arrangements.’*¹⁰

The interpretation of the ruling is that it has extended the scope of the safeguards over many more people receiving care within health and social care settings. For example, it has been suggested that the safeguards could now apply to patients sedated in intensive care.¹¹ The likelihood that the judgement will lead to increased numbers of cases has sparked concern among provider and local authority leaders.

The implications of the judgement will be explored and clarified over the coming months by a number of organisations including the Care Quality Commission (CQC), the Law Commission¹² and the Association of Directors of Adult Social Services (ADASS).

In the meantime, healthcare professionals must familiarise themselves with the developments to ensure that their current or future treatment of an incapacitated individual is lawful and in their best interests.

Note – it is important to separate the question of deprivation of liberty (“is the person being deprived of their liberty?”) from whether it is necessary, appropriate, in the person’s best interests or similar arguments (“why are we doing it?”). The former determines whether the situation needs to be authorised, the latter whether it will be.¹³

Determining deprivation of liberty

Under the ruling from the Supreme Court the two key questions to ask in determining whether someone is objectively deprived of their liberty are:

1. Is the person subject to continuous supervision and control?
2. Is the person free to leave?

There are several factors which are **not relevant** to whether or not an individual is deprived of their liberty these include:

- the person’s lack of objection
- the reason or purpose leading to a particular placement
- the relative normality of the care arrangements being made

⁹ Department of Health. [Deprivation of Liberty Safeguards \(DoLS\)](#). 2014 March 28

¹⁰ Department of Health. [Deprivation of Liberty Safeguards \(DoLS\)](#). 2014 March 28

¹¹ [www.hj.co](#).

¹² The [Law Commission](#) is a statutory independent body. It reviews areas of the law that have become unduly complicated, outdated or unfair and makes recommendations for reform to Government.

¹³ Hempsons. [Deprivation of Liberty Newsflash – have you changed your approach?](#) 2014 March 27

Further details are set out in a [CQC briefing](#).¹⁴

The Supreme Court did not define or describe what was meant by "*continuous supervision and control*" or "*free to leave*", although the CQC provides further explanations about these questions in [its briefing](#).¹⁵

If there is concern that the care or treatment given may constitute a deprivation of liberty it is important to consider whether that treatment is in the individual's best interests or if the care could be delivered in a less restrictive manner.

Managing authorities (Registered Managers of hospital, independent healthcare organisations and care homes) have a responsibility under the safeguards to ensure they comply with the Deprivation of Liberty Safeguards Code of Practice. This sets out the organisation's and individual's responsibility to ensure that where patients lack the capacity and a deprivation of liberty occurs, or will occur, the appropriate application is made and authorisation sought.

Where this test is applicable and the person is in:

- A care home or hospital (including hospice), the relevant Supervisory Body is the local authority (through the Deprivation of Liberty Safeguards – DOLS).
- An environment other than a care home or hospital, the relevant Supervisory body is the Court of Protection.

What's happening next?

As a consequence of the Supreme Court ruling much of the existing guidance needs to be updated. Work is being undertaken nationally by the Law Commission and by the Association of Directors of Adult Social Services (ADASS) to address the need for further guidance and any amendments required to the legislative framework. Further case law may also clarify interpretation of the Supreme Court ruling.

Development of guidance

In response to a highly critical House of Lords Select Committee report on the implementation of the MCA and DoLS¹⁶, the government acknowledged a lack of awareness and understanding of the system and set out a series of actions to improve implementation of the MCA including DoLS. These include:

- The commissioning of new guidance on deprivation of liberty case law
- A project to streamline the DoLS forms and to establish a task group to assist local authorities, and
- Work to explore the implications of the Supreme Court ruling.¹⁷

The government has confirmed that it has no intention to replace the DoLS although the Law Commission is undertaking a review of them.

¹⁴ Care Quality Commission. [Deprivation of liberty in health and social care](#). Briefing 2014 April 16

¹⁵ Care Quality Commission. [Deprivation of liberty in health and social care](#). Briefing 2014 April 16

¹⁶ Select Committee on the Mental Capacity Act 2005. [Mental Capacity Act 2005: post-legislative scrutiny](#). (HL 2013-14, 139)

¹⁷ HM Treasury. [Valuing every voice, respecting every right: the Government's response to the House of Lords Select Committee report on the Mental Capacity Act 2005](#). (Cm; 8884) London: Stationery Office, 2014.

The Care Quality Commission

The MCA is amongst the Care Quality Commission's priorities in its current overhaul of the regulation and inspection model. The CQC will also be developing its work with local authorities in their role as supervisory bodies; further developing ways to gather the experiences of people lacking capacity, their families, carers and friends; as well as promoting evidence of what works well.¹⁸

[Guidance from CQC](#) includes calls to:

- **Raise awareness and understanding amongst staff**

The CQC has called for care homes, hospitals and local authorities to work together locally to raise awareness and improve understanding of the Deprivation of Liberty Safeguards and the Mental Capacity Act more widely.¹⁹ The Department of Health point out that relevant staff should be familiar with the provisions of the Mental Capacity Act, in particular the five principles and specifically the 'least restrictive' principle.²⁰

- **Make sure applications and their outcomes are notified**

Notifying the CQC of applications to use the DoLS and their outcomes helps build knowledge of how and where the DoLS are being used and is therefore, an important part of protection for people subject to the safeguards.²¹ Notification forms for the CQC are available on their website²².

- **Review care and treatment plans**

Existing care and treatment plans for individuals lacking capacity should be reviewed in the light of the Supreme Court judgement's revised test and applications for standard authorisations should be made as appropriate.²³

General implications

The Supreme Court ruling has clarified and in so doing apparently widened the previously understood definition of deprivation of liberty. While this has helped to clarify its use in relation to people in specific situations, it has also made the relevance of DoLS to people in other specific situations less clear, including people receiving hospice care.

Resourcing the management of the requests

Following the Supreme Court judgement, the CQC anticipates that many more requests for authorisations under the deprivation of liberty safeguards will be made

¹⁸ Care Quality Commission. [Monitoring the use of the Deprivation of Liberty Safeguards in 2011/12](#). [Infographic]. [Updated 20 May 2014]

¹⁹ Care Quality Commission. [Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2012/13](#). Care Quality Commission, [2014], p.6

²⁰ Department of Health. [Deprivation of Liberty Safeguards \(DoLS\)](#). 2014 March 28

²¹ Care Quality Commission. [Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2012/13](#). Care Quality Commission, [2014]

²² Similar processes are expected in Wales.

²³ Department of Health. [Deprivation of Liberty Safeguards \(DoLS\)](#). 2014 March 28

for people in care homes and hospitals.²⁴ Similarly, applications to the Court of Protection for those in domestic settings with support are expected to increase.

Figures from ADASS (the Association of Directors of Adult Social Services) suggest that local authority adult social care departments expect the number of DoLS referrals from hospitals and residential settings to rise tenfold in the aftermath of the Supreme Court ruling.²⁵

Sir James Munby, President of the Family Division, has stated that "*numbers of deprivation of liberty (cases) are vastly greater than previously assumed*" placing an "*immense burden*" on local authorities.²⁶

Although steps have been taken to outline a more "*streamlined*" approach to DoLS authorisations, advice so far has been limited to reducing the impact of the *Cheshire West* case on the workload of the Court of Protection, not on the impact on hospitals or care homes.²⁷

It is therefore, likely, that hospices can expect a rise in application activity. The implications of an ageing population and the number of people living in domestic settings with dementia or other neurological conditions (and who may also have complex health and care needs) should also not be overlooked.²⁸

Implications for hospices

The application of the Supreme Court ruling to patients being cared for by hospices is unclear. With the help of members, we have identified a number of scenarios intended to trigger discussion as to where hospices may, or may not, be required to make a DoLS application. Please note these are **not** intended to set out circumstances where an application **would** be required but to prompt thinking around how a hospice would respond in these situations:

1. An actively dying in-patient who has lost capacity or consciousness, and is receiving sedative medication to manage symptoms of their terminal phase.
2. A delirious in-patient whose condition and capacity is fluctuating and who is receiving medication or support to manage their state, and hourly intentional rounding.
3. A wandering cognitively impaired in-patient at risk of falls who has a nurse call system that activates when the patient starts wandering.
4. A patient with dementia requiring inpatient care who is prevented from leaving the hospice to ensure ongoing care.

²⁴ Care Quality Commission. [Deprivation of liberty in health and social care](#). Briefing 2014 April 16

²⁵ ADASS. [Number of DoLS referrals rise tenfold since Supreme Court ruling](#). [News item] 2014 June 06

²⁶ 'Immense Burden' warning over care 8th May 2014 <http://www.belfasttelegraph.co.uk/news/local-national/uk/immense-burden-warning-over-care-30256939.html>

²⁷ X and Ors (Deprivation of Liberty) [2014] EWCOP 25 (7th August 2014)

²⁸ Care Quality Commission. [Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2012/13](#). Care Quality Commission, [2014]

5. A patient in the terminal phase of their illness who is receiving twenty four hour care through a Hospice at Home service.

We are seeking clarification of the impact of the Supreme Court ruling on such scenarios including the implications of an advance decision or advance statement being in place. We are aware of the potential implications for patients, families and carers, and for hospices in relation to the processes and potential delays involved in DoLS applications and requirements. Further, and of particular relevance to end of life care, we are aware of the potential impact on families, carers and hospices in relation to the requirement for a death to be referred to a Coroner where the person has a deprivation of liberty authorisation in place.

Further caselaw continues to develop around the ruling²⁹.

What actions is Hospice UK taking?

Help the Hospices is exploring ways to contribute to the work being undertaken by professional and regulatory bodies to clarify the Supreme Court ruling and its implications for people using hospice care and the organisations providing it:

- Engaging with the Department of Health for clarification on the implications for hospice care.
- Working to ensure that there is a hospice representation to work currently being undertaken by the Law Society and ADASS.
- We will keep members up to date on developments.

What actions can hospices be taking?

We encourage members to take a number of actions following the Supreme Court ruling:

- Ensure all staff involved in care provision are aware of and understand the MCA.
- Ensure all staff involved in care provision are aware of and understand DoLS.
- Ensure that MCA leads consider the implications for hospices outlined above, and develop and implement policies and systems necessary.
- Ensure that patient records and care plans are reviewed to identify where a possible deprivation of liberty is occurring.³⁰
- Ensure that hospice MCA leads engage with their local authorising body to discuss the implications of the Supreme Court ruling.
- Ensure that hospice MCA leads engage with their local coroners to discuss the implications of the ruling.
- Ensure senior managers, hospice boards and insurers are aware of the implications of the ruling and actions being taken.

²⁹ Judgement in the case of [Rochdale MBC v KW](#) from 7 November 2014. This case is expected to go to appeal.

³⁰ This review may consider whether the person does actually lack capacity to consent to being cared for. For example have all reliable attempts been made to support the person to give their consent. If a possible deprivation of liberty is occurring is there a way to provide care in a less restrictive way.

Wider use of advance decisions and advance statements together with lasting power of attorney for health and welfare would be helpful in establishing whether a person has consented to a particular treatment.

Contact

For any queries in relation to the content of this briefing please contact Karen Lynch, Policy Implementation Manager at k.lynch@hospiceuk.org.

Resources

ADASS *Advice Note August 2014 – [Guidance for local authorities in light of the Supreme Court decisions on deprivation of liberty](#)*

Department of Health. *[Update following the 19 March Supreme Court judgement. 2014 September 8](#)*

Care Quality Commission. *[Deprivation of liberty in health and social care. Briefing 2014 April 16](#)*

Care Quality Commission. *[Briefing for providers on the Deprivation of Liberty Safeguards. 2014 April 16](#)*

Department of Health. *[Deprivation of Liberty Safeguards \(DoLS\). 2014 March 28](#)*

Ministry of Justice. *[Mental Capacity Act 2005: Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice. London: TSO, 2008](#)*

Social Care Institute for Excellence (SCIE). *[Report 66: Deprivation of Liberty Safeguards: putting them into practice August. 2014](#)*

Further resources are listed in Appendix B of the Care Quality Commission's fourth annual report – *[Monitoring the use of the Mental Capacity Act Deprivation of Liberty Safeguards in 2012/13](#)* – published in 2014.

All links in this document were accurate on 21 November 2014.

Disclaimer

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Appendix 1

Chronology

2005 – The Mental Capacity Act

The Mental Capacity Act (MCA) became law to provide a framework to empower and protect people who may lack capacity to make decisions. The Act created the Court of Protection and the [Office of the Public Guardian](#).

2007 – The Mental Health Act

The Mental Health Act included a provision to amend the MCA by introducing the Deprivation of Liberty Safeguards (DoLS). DoLS came into force in 2009 and were an attempt to address the "Bournewood gap" so that all those lacking capacity deprived of their liberty have safeguards.

2009 – Deprivation of Liberty Safeguards (DoLS)

DoLS come into force.

2009 – Care Quality Commission created

The Care Quality Commission (CQC) was established to regulate health and social care services in England. The integrated regulator was also made responsible for monitoring the operation of DoLS. CQC has consistently highlighted mixed experiences of DoLS by people across the country, low levels of understanding of DoLS among the public and health professionals and providers not updating CQC on the outcomes of DoLS applications.

2014 – Care Quality Commission announcement

CQC announced in January that it would be embedding checks on DoLS within its new regulatory model, which will be introduced on 1 October 2014

2014 – March Supreme Court Ruling

The Supreme Court ruled on two cases relating to the application of DoLS clarifying the scope of the safeguards. The ruling extended the scope of DoLS but no guidance was produced. The Government responded to the ruling stating that the Law Commission would be asked to develop guidance and that the Association of Directors of Adult Social Services would be asked to explore the implications of the ruling on local authorities.

2014 – Work by Association of Directors of Adult Social Services, the Law Society, the CQC and the Department of Health

Work is being undertaken to explore the implications of the ruling.

2017 – The Law Commission

Law Commission expected to report on its review of the law.

Appendix 2

Five principles of the Mental Capacity Act ³¹

At the heart of the MCA in terms of concepts and values are the five 'statutory principles' (Section 1, MCA)

Principle 1: A presumption of capacity

Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.

Principle 2: Individuals being supported to make their own decisions

A person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means you should make every effort to encourage and support people to make the decision for themselves. If lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.

Principle 3: Unwise decisions

People have the right to make what others might regard as an unwise or eccentric decision. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. You cannot treat them as lacking capacity for that reason.

Principle 4: Best interests

If a person has been assessed as lacking capacity then any action taken, or any decision made for, or on behalf of that person, must be made in his or her best interests.

Principle 5: Less restrictive option

Someone making a decision or acting on behalf of a person who lacks capacity must consider whether it is possible to decide or act in a way that would interfere less with the person's rights and freedoms of action, or whether there is a need to decide or act at all. In essence, any intervention should be proportional to the particular circumstances of the case.

³¹ From [Social Care Institute for Excellence \(SCIE\)](#)