

# NursingDirect

POLICY NUMBER: **49**

POLICY TITLE: **DEPRIVATION OF LIBERTY INFORMATION AND GUIDANCE**

WHO MUST ABIDE BY THIS POLICY? **ALL TEMP STAFF**



# DEPRIVATION OF LIBERTY INFORMATION AND GUIDANCE

## THE PURPOSE OF THIS POLICY

To ensure that the Deprivation Of Liberty information and guidance is set out in a policy.

## KEY MESSAGES

- The Deprivation of Liberty Safeguards are an amendment to the Mental Capacity Act 2005. They apply in England and Wales only.
- The Mental Capacity Act allows restraint and restrictions to be used – but only if they are in a person's best interests.
- Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty. These are called the Deprivation of Liberty Safeguards.
- The Deprivation of Liberty Safeguards can only be used if the person will be deprived of their liberty in a care home or hospital. In other settings the Court of Protection can authorise a deprivation of liberty.
- Care homes or hospitals must ask a local authority if they can deprive a person of their liberty. This is called requesting a standard authorisation.

There are six assessments which have to take place before a standard authorisation can be given.

If a standard authorisation is given, one key safeguard is that the person has someone appointed with legal powers to represent them. This is called the relevant person's representative and will usually be a family member or friend.

Other safeguards include rights to challenge authorisations in the Court of Protection, and access to Independent Mental Capacity Advocates (IMCAs).

## WHAT IS A DEPRIVATION OF LIBERTY?

Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'. The Deprivation of Liberty Safeguards is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

A Supreme Court judgement in March 2014 made reference to the 'acid test' to see whether a person is being deprived of their liberty, which consisted of two questions:

**Is the person subject to continuous supervision and control?** and

**Is the person free to leave?** – with the focus being not on whether a person seems to be wanting to leave, but on how those who support them would react if they did want to leave.

If someone is subject to that level of supervision, and is not free to leave, then it is likely that they are being deprived of their liberty. But even with the 'acid test' it can be difficult to be clear when the use of restrictions and restraint in someone's support crosses the line to depriving a person of their liberty. Each case must be considered on its own merits, but in addition to the two 'acid test' questions, if the following features are present, it would make sense to consider a deprivation of liberty application:

Frequent use of sedation/medication to control behaviour

Regular use of physical restraint to control behaviour

The person concerned objects verbally or physically to the restriction and/or restraint

Objections from family and/or friends to the restriction or restraint

The person is confined to a particular part of the establishment in which they are being cared for

The placement is potentially unstable

Possible challenge to the restriction and restraint being proposed to the Court of Protection or the Ombudsman, or a letter of complaint or a solicitor's letter

The person is already subject to a deprivation of liberty authorisation which is about to expire.

## RESTRAINT AND RESTRICTIONS

The Mental Capacity Act allows restrictions and restraint to be used in a person's support, but only if they are in the best interests of a person who lacks capacity to make the decision themselves. Restrictions and restraint must be proportionate to the harm the care giver is seeking to prevent, and can include:

Using locks or key pads which stop a person going out or into different areas of a building

The use of some medication, for example, to calm a person

Close supervision in the home, or the use of isolation

Requiring a person to be supervised when out

Restricting contact with friends, family and acquaintances, including if they could cause the person harm

Physically stopping a person from doing something which could cause them harm

Removing items from a person which could cause them harm

Holding a person so that they can be given care, support or treatment

Bedrails, wheelchair straps, restraints in a vehicle, and splints

The person having to stay somewhere against their wishes or the wishes of a family member

Repeatedly saying to a person they will be restrained if they persist in a certain behaviour.

Such restrictions or restraint can take away a person's freedom and so deprive them of their liberty. They should be borne in mind when considering whether the support offered to a person is the least restrictive way of providing that support.

Care providers don't have to be experts about what is and is not a deprivation of liberty. They just need to know when a person might be deprived of their liberty and take action.

Final decisions about what amounts to a deprivation of liberty are made by courts. The Code of Practice for the Deprivation of Liberty Safeguards gives examples of where courts have found people being and not being deprived of their liberty. These examples, together with other cases which have gone to the courts, should be used as a guide.

Care providers don't have to be experts about what is and is not a deprivation of liberty. They just need to know when a person might be deprived of their liberty and take action. When care providers are putting together the care plans of persons who are unable to consent to their care, they should consider whether any restrictions or restraint being proposed in the best interests of the person amount to a deprivation of liberty.

### Practice example

*Ben has learning disabilities and Prader-Willi syndrome. There are concerns about his health because his weight has been increasing steadily and now stands at 120kg. Staff in his residential home have tried to support Ben to limit what he eats and to make healthy choices but with little effect. Ben has been assessed as lacking capacity to make decisions about the amount and type of food he eats (this is common among people with Prader-Willi syndrome). It has been proposed that it is in Ben's best interests to stop him going into the kitchen, and always supervising him when out, to prevent him spending all his money on, or stealing, food. An application is made by the home manager for standard authorisation because they believe that the restrictions would deprive Ben of his liberty.*

## HOW IS DEPRIVATION OF LIBERTY AUTHORISED UNDER DOLS?

The Deprivation of Liberty Safeguards (DoLS) can only apply to people who are in a care home or hospital. This includes where there are plans to move a person to a care home or hospital where they may be deprived of their liberty. The care home or hospital is called the managing authority in the Deprivation of Liberty Safeguards.

Where a managing authority thinks it needs to deprive someone of their liberty they have to ask for this to be authorised by a supervisory body. They can do this up to 28 days in advance of when they plan to deprive the person of their liberty.

For care homes and hospitals the supervisory body is the local authority where the person is ordinarily resident. Usually this will be the local authority where the care home is located unless the person is funded by a different local authority.

The managing authority must fill out a form requesting a standard authorisation. This is sent to the supervisory body which has to decide within 21 days whether the person can be deprived of their liberty.

The supervisory body appoints assessors to see if the conditions are met to allow the person to be deprived of their liberty under the safeguards. They include:

- The person is 18 or over (different safeguards apply for children).
- The person is suffering from a mental disorder.
- The person lacks capacity to decide for themselves about the restrictions which are proposed so they can receive the necessary care and treatment.
- The restrictions would deprive the person of their liberty.
- The proposed restrictions would be in the person's best interests.
- Whether the person should instead be considered for detention under the Mental Health Act.
- There is no valid advance decision to refuse treatment or support that would be overridden by any DoLS process.

If any of the conditions are not met, deprivation of liberty cannot be authorised. This may mean that the care home or hospital has to change its care plan so that the person can be supported in a less restrictive way.

If all conditions are met, the supervisory body must authorise the deprivation of liberty and inform the person and managing authority in writing. It can be authorised for up to one year.

The person does not have to be deprived of their liberty for the duration of the authorisation. The restrictions should stop as soon as they are no longer required.

Conditions on the standard authorisation can be set by the supervisory body. These must be followed by the managing authority.

Standard authorisations cannot be extended. If it is felt that a person still needs to be deprived of their liberty at the end of an authorisation, the managing authority must request another standard authorisation.

#### *Practice example*

*Claire has an acquired brain injury. Her GP has referred her to the local hospital for a minor operation on her foot. The doctor assessed Claire as lacking capacity to make the treatment decision herself and so after consulting Claire's mother is proposing that it is in her best interests to have the surgery. From past experience it is known that Claire will need to be sedated throughout her stay in hospital.*

*This is to stop her removing the dressing and picking at the wound. On the advice of the GP, the hospital makes an application for a standard authorisation for the use of sedation which is granted before she is admitted.*

## URGENT AUTHORISATIONS

A person may need to be deprived of their liberty before the supervisory body can respond to a request for a standard authorisation. In these situations the managing authority can use an urgent authorisation. Urgent authorisations are granted by the managing authority itself. There is a form that they have to complete and send to the supervisory body.

The managing authority can deprive a person of their liberty for up to seven days using an urgent authorisation.

The managing authority can deprive a person of their liberty for up to seven days using an urgent authorisation. It can only be extended (for up to a further seven days) if the supervisory body agrees to a request made by the managing authority to do this.

When using an urgent authorisation the managing authority must also make a request for a standard authorisation. The managing authority must have a reasonable belief that a standard authorisation would be granted if using an urgent authorisation.

Before granting an urgent authorisation, the managing authority should try to speak to the family, friends and carers of the person. Their knowledge of the person could mean that deprivation of liberty can be avoided. The managing authority should make a record of their efforts to consult others.

#### *Practice example*

*Brian has been living in a nursing home for the past three years. Recently he has become very agitated and distressed which is thought to be linked to his dementia. He tells people he wants to go home not remembering that he had to give his flat up when he moved into the home. He also spends a lot of time trying to open the front door which has a key pad lock on. An incident has occurred where he climbed out of his ground floor bedroom window and was only found a couple of hours later on a main road. The nursing home asks the local authority for a standard authorisation. They want to continue to use the key code so that Brian does not go out unaccompanied, and to put safety locks on some of the windows. Because of the seriousness of the recent incident, the home manager completes the form for the urgent authorisation and arranges the window locks to be fitted the same day.*

## SAFEGUARDS FOR PEOPLE WHO MAY BE DEPRIVED OF THEIR LIBERTY

The first safeguard is the assessment process for a standard authorisation which involves at least two independent assessors who must have received training for their role. There will always be one mental health assessor and one best interest's assessor who will stop deprivation of liberty being authorised if they do not think all the conditions are met.

Family, friends and paid carers who know the person well should be consulted as part of the assessment process. They may have suggestions about how the person can be supported without having to deprive them of their liberty. Those people who don't have family or friends who can represent them have a right to the support of an Independent Mental Capacity Advocate (IMCA) during the assessment process. And at all times, the fifth principle of the Mental Capacity Act, that any decision made in a person's best interests must be the least restrictive of their rights and freedoms, should be borne in mind.

*If the person has an unpaid relevant person's representative, both they and their representative are entitled to the support of an Independent Mental Capacity Advocate.*

If standard authorisation is granted the following safeguards are available:

- The person must be appointed a relevant person's representative as soon as possible. Usually this will be a family member or friend who agrees to take this role. If there is no one willing or able to take this role on an unpaid basis, the supervisory body must pay someone, such as an advocate, to do this.
- The person and their representative can require the authorisation to be reviewed at any time, to see whether the criteria to deprive the person of their liberty are still met, and if so whether any conditions need to change.
- The person and their relevant person's representative have a right to challenge the deprivation of liberty in the Court of Protection at any time.
- If the person has an unpaid relevant person's representative, both they and their representative are entitled to the support of an IMCA. It is good practice for supervisory bodies to arrange for an IMCA to explain their role directly to both when a new authorisation has been granted.
- The home or hospital should do all it reasonably can to explain to a detained person and their family what their rights of appeal are and give support.

## WHEN DOLS CANNOT BE USED

The Deprivation of Liberty Safeguards can only be used if a person is in hospital or a care home. If a person is living in another setting, including in supported living or their own home, it is still possible to deprive the person of their liberty in their best interests, via an application to the Court of Protection.

If a person is in hospital they should not be subject to the Deprivation of Liberty Safeguards if they meet the criteria for detention under the Mental Health Act.

The Deprivation of Liberty Safeguards should not be used if the main reason is to restrict contact with individuals who may cause the

person harm. If it is believed to be in a person's best interests to limit contact an application should be made to the Court of Protection.

If there is a dispute about where a person should stay, an authorisation does not resolve the dispute. The Code of Practice of the Mental Capacity Act says that unresolved disputes about residence, including the person themselves disagreeing, should be referred to the Court of Protection.

#### *Practice example*

*The local authority is following safeguarding proceedings for Mavis, a woman with dementia who is currently living at home with her husband. They are concerned her needs are not being met because her husband is refusing the support that is being offered. It is believed that he has untreated mental health needs. Mavis was assessed as lacking capacity to decide on her residence, though clearly communicates a wish to remain in her own home.*

*It has been proposed that a placement in a care home would be in Mavis's best interests. It is also believed that in the care home she will need a high level of restrictions to give her appropriate care and treatment.*

*Because the move is against Mavis's wishes and those of her husband, the local authority makes a fast-track application to the Court of Protection to make a decision in her best interests. If the court authorizes a move to the care home, an application will be made by the home for a standard authorisation under the Deprivation of Liberty Safeguards.*

## DEPRIVATION OF LIBERTY WITHOUT AUTHORISATION

If you are working in a care home or hospital where you think a person is being deprived of their liberty, you should see if care could be provided in a less restrictive way. If depriving the person of their liberty seems unavoidable, an application should be made for a standard authorisation at the same time as an urgent authorisation is given.

If you come across someone in another setting who may be deprived of their liberty you should bring this to the attention of the manager so they either change their care or seek authorisation. Other options are to inform the supervisory body, to make a safeguarding alert to the local authority, or to challenge what may be an unlawful deprivation of liberty in the Court of Protection.

## OTHER INFORMATION

If a care/nursing home or hospital makes an application to a local authority for a deprivation of liberty authorisation, it must inform the Care Quality Commission, once the outcome of the application is known. CQC provides a form for this purpose. Similarly, if a supported living, shared lives or other community provider requests an authorisation of a deprivation of liberty from the Court of Protection, the CQC must be informed once the outcome is known, using the same form.

(Download CQC statutory notification: Application to deprive a person of their liberty and its outcome)

If a person subject to a deprivation of liberty authorisation should die while subject to the authorisation the local Coroner's Office should be informed by the care provider.