

Department for Communities

Deprivation of Liberty Safeguards

A guide to what you need to know



Fact Sheet 15

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Background

The Mental Capacity Act 2005 provides a legal framework for assessing whether a person has mental capacity to make certain decisions for themselves. It also defines how others can make decisions on behalf of someone who lacks mental capacity. These decisions must be made in the best interests of the person lacking capacity.

The Deprivation of Liberty Safeguards (**DoLS**) were inserted into the Mental Capacity Act 2005 via an amendment to the Mental Health Act 2007. The Deprivation of Liberty Safeguards provide legal protection for people who lack the capacity to consent to care and /or treatment in either a hospital or nursing/care home setting but who need such care or treatment in their own best interests and to protect them from harm. The Deprivation of Liberty Safeguards provides a set of checks that aims ensure that any care that restricts a person's liberty is both appropriate and in their best interests. This leaflet explains who is covered by the safeguards, what counts as a deprivation of liberty, what the safeguards are, and how to go about getting a deprivation of liberty authorised and reviewed.

Who is covered by the Safeguards?

The Deprivation of Liberty Safeguards apply to people in England and Wales who have a mental disorder (as defined by the Mental Health Act 2007) and lack capacity to consent to the arrangements made for their care and treatment, but for whom receiving care and treatment in circumstances that amount to a deprivation may be necessary to protect them from harm, is the least restrictive option and in their best interests. For example people with learning disabilities, dementia and neurological conditions who lack mental capacity can be subject to the safeguards.



These safeguards only apply to people aged 18 or over in residential, nursing and hospital settings. The Children Act 1989, Mental Health Act 1983 or an application to the Court of Protection should be considered if issues concerning deprivation of liberty occur for people under the age of 18.

A Deprivation of Liberty in a domestic setting e.g. a person's own home, shared lives or supported living can only be authorised through an application to the Court of Protection, and applies to situations where there is state involvement.

What is a Deprivation of Liberty?

Under Article 5 of the Human Rights Act it 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 a resident or patient of their liberty but they lack capacity to consent to their care and treatment to keep them safe from harm.

In March 2014 a Supreme Court judgment clarified the law on what constitutes a Deprivation of Liberty. The Court made reference to the ‘**acid test**’ to ascertain whether a person is being deprived of their liberty for the purposes of Article 5 of the Human Rights Act when the person:

- **Is under continuous supervision and control; and**
- **Is not free to leave; and**
- **Lacks capacity to consent to these arrangements.**

The Court held that factors which are **not** relevant in determining whether there is a deprivation of liberty include:

- The person's compliance or lack of objection;
- The reason or purpose behind a particular placement; and
- The extent to which it enables them to live a relatively normal life for someone with their level of disability.

The ‘**acid test**’ is far broader than that set by previous judgments – disabled people should not face a tougher standard for being deprived of their liberty than non-disabled people.

If someone is subject to the level of supervision and control outlined above and not free to leave then it is likely 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 supporting an individual crosses the line to deprive a person of their

liberty. Each case must be considered on its own merits. The use of the following would indicate that serious consideration should be given to a deprivation of liberty application:

- Using medication frequently to control behaviour.
- Physical restraint to control behaviour.
- Objection by the person concerned verbally /physically to restriction or restraint.
- Objection by the person to their placement in the Residential/Nursing Home.
- Family or friends object to the restrictions or restraint placed upon the person.
- The person is confined to a part of the establishment in which they are cared for.

The process of applying and authorising a Deprivation of Liberty

Residential and Nursing Homes have responsibilities under the Deprivation of Liberty Safeguards to ensure that none of their residents are unlawfully deprived of their liberty; that is without appropriate authorisation. Carmarthenshire County Council is what called the **Supervisory Body** and is responsible for authorisations under the Deprivation of Liberty Safeguards. The Residential or Nursing Home where a person may be subject to a deprivation of liberty is called the **Managing Authority**. **Please note that hospital patients who may or are deprived of their liberty come under the Hywel Dda University Board who acts as the Supervisory Body.**

The Residential or Nursing Home hereafter referred to as the **Managing Authority** must be able to recognise when a resident is being deprived of their liberty. **The Managing Authority** should consider whether the person lacks capacity to decide whether or not they should be accommodated in the Residential or Nursing Home.

The following should be considered by the **Managing Authority**:

- Can the person **understand** the decision to be made, and why it needs to be made?
- Can the person **retain** the information long enough to consider the options?
- Can the person **weigh** up the information and consider the consequences of the decision including risk?
- Can the person **communicate** this decision (via any means)?

If the person is unable to fulfil the above, then they probably lack the capacity to make the decision. Furthermore, the **Managing Authority** must be able to

recognise when a person who lacks capacity is being deprived of their liberty and meets the 'acid test' – under **continuous supervision and control** and **not free to leave**.

The **Managing Authority** on identifying a person who is being deprived of his/her liberty should complete the prescribed form and submit it to the **Supervisory Body (Carmarthenshire County Council)** requesting an assessment for what is called a Standard Authorisation. The **Managing Authority** can also issue themselves with an Urgent Authorisation if a deprivation of liberty is unavoidable and needs to commence before the Standard Authorisation can be obtained. Managing Authorities must apply for a Standard Authorisation at the same time as completing the Urgent Authorisation part of the form. The Urgent Authorisation cannot exceed 7 days unless an extension of a further 7 days is agreed by the **Supervisory Body (Carmarthenshire County Council)**. The **Managing Authority** must inform the resident (the **Relevant Person**) and the Relevant Person's family, friends and/or carers if they are making a request for a Deprivation of Liberty Safeguards authorisation. The **Managing Authority** must also inform the **Supervisory Body (Carmarthenshire County Council)** if the resident (**Relevant Person**) is un-befriended and meets the eligibility criteria for the appointment of an Independent Mental Capacity Advocate.

The **Supervisory Body (Carmarthenshire County Council)** on receipt of a request for a Standard Authorisation appoints a **Best Interest Assessor** and a **Medical Assessor** to undertake the assessment. There are **six** parts to the assessment process:

- **Age assessment** – is the person over 18 years of age?
- **Mental Health** – Does the person have a mental disorder?
- **Mental Capacity** – Does the person lack mental capacity to make decision about their care arrangements?
- **Best Interests** – Does a deprivation of liberty apply? If so is it:
 - in the person's best interests?
 - required to keep the person safe from harm?
 - a reasonable response to the likelihood of the person suffering harm (including less restrictive options and if they are more appropriate).
- **Eligibility**- Is the person already liable to detention under the Mental Health Act 1983, or would they meet the requirements for detention under this Act? If they are then the Mental Health Act should apply and not the Deprivation of Liberty Safeguards.
- **No Refusals** – Would the authorisation contradict or conflict with any advance decision the person has made refusing treatment or with any

decisions made by for example, a court appointed Deputy or someone with a Lasting Power of Attorney.

If all the assessments conclude that the **Relevant Person** meets the requirements for an authorisation and all the assessments have been passed to the **Supervisory Body (Carmarthenshire County Council)** then a Standard Authorisation must be issued to the **Managing Authority**.

The Supervisory Body (Carmarthenshire County Council) must set the period for the authorisation which must not be longer than that recommended by the Best interest Assessor and cannot exceed **12 months**.

The Supervisory Body (Carmarthenshire County Council) cannot give an authorisation if one of the assessments has not been fulfilled and the assessment process should be stopped immediately.

The **Supervisory Body (Carmarthenshire County Council)** may attach conditions to the Standard Authorisation and must consider those recommended by the Best Interest Assessor. If conditions are set they should be acted upon.

Please note that a Standard Authorisation cannot be transferred to another Residential or Nursing Home and an application must be made for a new Standard Authorisation before a move takes place.

The Role of the Relevant Person's Representative

If the **Supervisory Body (Carmarthenshire County Council)** grants a Standard Authorisation it must appoint what is called a **Relevant Person's Representative** as soon as possible to represent the person who has been deprived of their liberty.

The role is to

- Maintain contact with the Relevant Person.
- Represent and support the Relevant Person in all matters relating to the Deprivation of Liberty Safeguards including triggering a review if necessary. This can include making an application to the Court of Protection.

This role is crucial to the deprivation of liberty process and allows the **Relevant Person** to be represented and supported in a manner that is independent of the care provider (**Managing Authority**) and the **Supervisory Body (Carmarthenshire County Council)**. If the **Relevant Person** does not have a friend or family member to fulfil this role then the **Supervisory Body (Carmarthenshire County Council)** will appoint a paid representative.

The role of the Independent Mental Capacity Advocate (IMCA)

If the **Relevant Person** is subject to a Deprivation of Liberty authorisation then they are required to have an appointed representative. In the absence of a family member or a friend to undertake this task an IMCA can be instructed to fill this gap whilst another is appointed. An IMCA can also be instructed if the Relevant Person or their representative request their assistance or the **Supervisory Body (Carmarthenshire County Council)** feels that appointing one will ensure the **Relevant Person's** rights are protected. In addition, the IMCA can undertake the role of paid representative in the absence of a suitable **Relevant Person's Representative**.

Review of the Standard Authorisation

A review of a Standard Authorisation is a formal process to decide whether the care that deprives someone of their liberty is still necessary.

If a review is requested by the **Relevant Person, IMCA** or the **Managing Authority** then the **Supervisory Body (Carmarthenshire County Council)** must undertake the review.

There are statutory grounds for review and they are:

- The **Relevant Person** no longer meets one or more of the six assessment requirements.
- The **Relevant Person** no longer meets the eligibility requirement because they object receiving mental health treatment in hospital and meet the criteria for an application for Sect 2 or 3 of the Mental Health Act 1983.
- There has been a change in the **Relevant Person's** situation and the conditions attached require changing therefore a review is required.
- The reasons the person now meets the qualifying requirements are different from those given at the time authorisation was granted.

The **Supervisory Body (Carmarthenshire County Council)** must tell the **Relevant Person**, their Representative and the **Managing Authority** if they are going to carry out a review.

Court of Protection

We understand that in some cases the **Relevant Person** or someone acting on their behalf may not agree with a Deprivation of Liberty authorisation or the conditions attaching to it.

In these cases we suggest that the **Relevant Person, Relevant Person's Representative**, friend, family member speaks to the Care Home Manager in the first instance. As previously mentioned a review can be undertaken of the DoLS if requested. In the event that you consider the outcome of this review unsatisfactory then an application can be made to the Court of Protection.

Please see the contact details for the Court of Protection at the end of this leaflet.

What happens when a person dies while subject to a Deprivation of Liberty Safeguards (DoLS) authorisation?

If a person dies while subject to a DoLS authorisation then the local Coroner must be informed. The Chief Coroner has determined that this will be classed as a "Death in Custody"

The **Managing Authority** must inform the local Coroner of the death. Once the Coroner has been notified the Coroner's Office will contact the next of kin to explain why the death is being reported and the steps that will follow. Please note that reporting a death to the Coroner whilst the person is subject to a DoLS authorisation is currently under review.

If you require any further information about the Deprivation of Liberty Safeguards then please do not hesitate to contact the DoLS Team who will be pleased to help with any questions you may have.

The DoLS Team, 5 Spilman Street, Carmarthen, Carmarthenshire, SA31 1LE
Tel: 01267 228950 Email: dols@carmarthenshire.gov.uk Fax: 01267 228878

Useful Organisations

Court of Protection, PO Box 70185, First Avenue House, 42-49 High Holborn, London, WC1A 9JA
Tel: 0300 456 4600 (Monday to Fridays)
Email: courtofprotectionenquiries@hmcts.gsi.gov.uk
Web: www.gov.uk/court-of-protection

Office of the Public Guardian, PO Box 16185, Birmingham B2 2WH
Tel: 0300 456 0300 (Customer Services – Monday to Fridays)
Email: customerservices@publicguardian.gsi.gov.uk Web: www.gov.uk/opg

Social Care Institute for Excellence (SCIE)

Kinnaird House, 1 Pall Mall East, London SW1Y 5BP

Tel: 020 7766 7400 Web: www.scie.org.uk

This website contains lots of information about DoLS.

Independent Mental Capacity Advocacy Service (IMCA)

IMCA Wales, Union Offices, Quarella Road, Bridgend CF31 1JW

Tel: 01656 649557 Email: imca@imcawales.org



For more information on social care services log onto:
www.carmarthenshire.gov.wales/socialcare