

Ensuring our safeguarding arrangements act  
to help and protect adults

# MENTAL CAPACITY ACT 2005 DEPRIVATION OF LIBERTY SAFEGUARDS POLICY

Version 3



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<b>Revision Number</b>	<b>Date Approved by the Board</b>	<b>Change Record</b>	<b>Links to Other Policies</b>	<b>Review Date:</b>
One	18 October 2016		All other Teeswide Safeguarding Adults Policies	Feb 2018
Two	24 April 2018	Minor amendments and checked for 'Think family' approach	Minor Amendments	April 2020
Three	25 February 2021	Added reference to Covid-19 and the weblinks to national guidance.		February 2022

## 1. Introduction

### SAFEGUARDING IS 'EVERYONE'S BUSINESS'

The Teeswide Safeguarding Adults Board is the statutory body that sets the strategic direction for safeguarding and is responsible for protecting adults who are experiencing, or who are at risk of abuse or neglect living in the Boroughs of Hartlepool, Middlesbrough, Redcar & Cleveland and Stockton-on-Tees.

The Deprivation of Liberty Safeguards (DoLS) came into force in England and Wales in 2009 and are part of wider legislation designed to protect the rights of people who lack mental capacity and who are placed in care homes or hospitals for care or treatment. Additionally the Supreme Court judgment in the case of *Cheshire West*<sup>1</sup> held that a deprivation of liberty can occur in community and domestic settings *where the State is responsible* for imposing such arrangements. This includes placements in a supported living arrangement. However, where there is, or is likely to be, a deprivation of liberty in such settings, it must be authorised by the Court of Protection.

The principles and definitions that support the commissioning and undertaking of DoLS are set out in the [Mental Capacity Act 2005](#), the [Mental Capacity Act Code of Practice \(2007\)](#), the [Deprivation of Liberty Safeguards Code of Practice 2008](#) and Chapter 13 of the [Mental Health Act Code of Practice 2015](#). Professionals from all sectors working within the MCA DoLS have a formal duty to have regard to these Codes of Practice.

At the time of reviewing this policy (December 2020) it is advised that professionals also refer to the following weblink for regularly updated guidance in response to the Covid-19 pandemic: [DHSC MCA & DoLS Emergency Guidance](#).

The Teeswide Safeguarding Adults Board is committed to the values of honesty, openness, transparency and proactive learning when applying the Deprivation of Liberty Safeguards.

## 2. Purpose

The purpose of this policy is to provide guidance about the Deprivation of Liberty Safeguards and on what is required of partners of the Teeswide Safeguarding Adults Board in ensuring that all staff and relevant commissioned services comply with this legislation.

This policy is supported by the Teeswide Inter-Agency Safeguarding Adults Policy and Procedures and by the individual policy and procedural guidance of each partner agency.

## 3. Scope

The MCA Deprivation of Liberty Safeguards apply to:

- People in hospital and in care homes (registered under the Health and Social Care Act 2008) who lack the capacity to consent to the arrangements made for their care or treatment

and:

- Who are aged 18 and over
- Who have a mental disorder
- For whom a deprivation of liberty may be necessary in their best interests to protect them from harm
- Meet the eligibility criteria
- No-one with the authority to refuse/ object is doing so

There may be instances in hospital settings where there is a choice between using DoLS or the Mental Health Act (MHA): MHA Chapter 13 can assist in making that choice.

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<sup>1</sup> P v Cheshire West and Chester Council and another, P and Q v Surrey County Council, 19 March 2014

A deprivation of liberty will only be lawful with an order from the Court of Protection in the event of people being cared for somewhere other than a care home or in hospital or between the ages of 16 & 18 if the MHA cannot be applied.

#### 4. Policy Statement

The Teeswide Safeguarding Adults Board works in partnership to safeguard and promote the well-being and independence of adults living in the Boroughs of Hartlepool, Middlesbrough, Redcar & Cleveland and Stockton-on-Tees, who are experiencing, or at risk of abuse or neglect. It further seeks to ensure that the Deprivation of Liberty Safeguards are properly applied across all partner agencies and relevant commissioned services, and that any lessons learned are used to review and revise policies and procedures accordingly. This is in order that it may assure itself of the protection of adults from either the risk of, or the experience of abuse or neglect. This policy is effective from 25 April 2018.

#### 5. Legal Framework

This policy has been developed within the context of the law and guidance that seeks to protect adults including:

- The [Mental Capacity Act 2005](#) (including Deprivation of Liberty Safeguards)
- The [Mental Capacity Act 2005: Code of Practice 2007](#)
- [Deprivation of Liberty Safeguards Code of Practice 2008](#)
- [European Convention on Human Rights \(ECHR\)](#)
- [The Human Rights Act 1998](#)
- [The Care Act 2014](#)
- [Care Act: Care and Support Statutory Guidance](#)
- [The Equality Act 2010](#)
- [Mental Health Act 1983](#) and the [New Code of Practice 2015](#)
- [Health and Social Care Act 2008](#)
- [The Health and Social Care Act 2008 \(Regulated Activities Regulations 2015\)](#)

Further links to useful websites can be seen on page eight.

#### 6. Who This Policy Applies To

This policy applies to all partners of the Teeswide Safeguarding Adults Board who have collective responsibility for ensuring that the Board is able to meet its statutory duties. Specific detail of the partnership is outlined in the Teeswide Safeguarding Adults Board's Inter-agency Safeguarding Adults Policy.

#### 7. The Mental Capacity Act 2005

The Mental Capacity Act 2005 provides a statutory framework to promote and safeguard decision making for people who lack capacity to make decisions for themselves or who have capacity and want to make provision for when they may lack capacity in the future. It sets out who can make decisions, in what situations, and how they should go about this. It is designed to protect and restore power to those vulnerable people who may lack capacity to make certain decisions; due to the way their mind is affected by illness or disability, or the effects of drugs or alcohol; and to support those who have capacity and choose to plan for their future.

#### 8. The Deprivation of Liberty Safeguards

##### *The 'Bournewood case'*

The Deprivation of Liberty Safeguards (DoLS) came into force in England and Wales in April 2009 under an amendment to the Mental Capacity Act (MCA) 2005. They were introduced following a

judgment in the European Court of Human Rights (ECHR)<sup>2</sup> known as the ‘Bournewood case’ to provide legal protection for vulnerable people over the age of 18, who are or may become, deprived of their liberty in a hospital or care home environment, whether placed under public or private arrangements. The European Court of Human Rights judged that the care conditions amounted to a ‘Deprivation of Liberty’ under article 5 (1) of the European Convention on Human Rights and therefore required a safeguarding procedure prescribed by law.

### ‘Cheshire West’

Further guidance was issued by the Department of Health in October 2015 following the Supreme Court Judgment of March 2014 in the case of *Cheshire West*<sup>3</sup>, which clarified an ‘acid test’ for what constitutes a Deprivation of Liberty.

The acid test states that an individual is deprived of their liberty for the purpose of Article 5 of the European Convention on Human Rights if all *three* of the following elements are met:

- Lack the capacity to consent to their care/treatment arrangements
- Are under continuous supervision and control
- Are not free to leave

A deprivation of liberty for such a person must be authorised in accordance with the Deprivation of Liberty Safeguards, or by the Court of Protection; or if applicable at that time, under the Mental Health Act 1983 (MHA). In addition, the Supreme Court also outlined factors, which are not relevant in determining whether there is a deprivation of liberty. The Court of Protection has held that the acid test also applies in acute non-psychiatric hospital settings.

The safeguards are designed to protect the interests of people who lack the capacity to make decisions for themselves and to:

- Ensure that they can be given the care they need in the least restrictive regimes
- Prevent arbitrary decisions that deprive vulnerable people of their liberty
- Provide them with rights of challenge against unlawful detention
- Avoid unnecessary bureaucracy

Authorisation of deprivation of liberty should be seen as a last resort with less restrictive alternatives that do not amount to deprivation of liberty put in place wherever possible.

### Ferreira Case

The Court of Appeal, on 26 January 2017, handed down a judgment on the Ferreira case that there is generally no Deprivation of Liberty in the administration of life saving treatment. See here for further details of this case law: [Ferreira case](#).

## 9. Principles

The Deprivation of Liberty Safeguards are underpinned by the same five key principles as those in the MCA 2005 (Section 1):

<b>A presumption of capacity</b>	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 it cannot be assumed that someone is unable to make a decision for themselves just because they have a particular medical condition or disability.
<b>Individuals being supported to make their own decisions</b>	A person must be given all practicable help before anyone treats them as not being able to make their own decisions. This means that every effort should be made to encourage and support people to make the decision

<sup>2</sup> HL v UK 45508/99 (2004) ECHR 471

<sup>3</sup> P v Cheshire West and Chester Council and another, P and Q v Surry County Council, 19 March 2014

	for themselves. If lack of capacity is established, it is still important that the person is involved as far as possible in making decisions.
<b>Unwise decisions</b>	People have the right to make decisions that others might regard as unwise or eccentric. People cannot be treated as someone lacking capacity for this reason.
<b>Best interests</b>	Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.
<b>Less restrictive option</b>	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. Any intervention should be weighed up in the particular circumstances of the case.

## 10. Assessment and Authorisation

Hospitals or care homes known as the **Managing Authority** must apply to the local authority (**the Supervisory Body**) for an authorisation of deprivation of liberty when they identify that a person who lacks capacity is being, or risks being deprived of their liberty. In doing so they 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

Assessments will be carried out to ascertain whether the person needs to be deprived of their liberty to keep them safe.

The Supervisory Body is the local authority where the person is ordinarily resident.<sup>4</sup>

### Standard Authorisation

Authorisation of a deprivation of liberty should be obtained in advance except in urgent circumstances and assessments completed within 21 days of the request. The duration of an authorisation will be determined on a case-by-case basis but may not be longer than 12 months. 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. The authorisation can be reviewed at any time, and must be reviewed if the individual or their representative requests this.

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

The Supervisory Body can set conditions on the standard authorisation and the managing authority must abide by any such conditions.

### 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 but they must simultaneously apply for standard authorisation, if it has not already done so. An urgent authorisation can last for up

<sup>4</sup> Care Act 2014 Sections 18-19 and 39-41; The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; The Care and Support (Disputes Between Local Authorities) Regulations 2014; Section 117 Mental Health Act 1983

to seven days, and can be extended once by the supervisory body for another seven days if the assessment procedure has not been completed.

### **The Right to Have a Relevant Person's Representative (RPR)**

The MCA DoLS make provision for every person deprived of their liberty (known as the Relevant Person) to have a Relevant Person's Representative (RPR) who is independent of the hospital or care home, to represent and support them in all matters relating to the operation of the DoLS. The role of the RPR is to keep in contact with the person and to make sure that decisions are being made in their best interests. The RPR will usually be a relative or friend of the person who is being deprived of their liberty. The Supervisory Body must instruct an Independent paid RPR if the person subject to the DoLS has no one who is appropriate or able/willing to represent them.

### **Access to the Court of Protection**

Every person deprived of their liberty, or someone acting on their behalf may challenge the deprivation of liberty authorisation in the Court of Protection. The relevant person and their RPR have a statutory right to arrange support of an Independent Mental Capacity Advocate (IMCA) when making an application to the Court of Protection.

## **11. Key Roles and Responsibilities**

### **Teeswide Safeguarding Adults Board**

The Teeswide Safeguarding Adults Board is responsible for ensuring that all staff and relevant commissioned services comply with the Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards. Professionals from all settings working within the MCA DoLS have a formal duty to have regard to the Codes of Practice.

### **Clinical Commissioning Groups (CCG)**

In discharging its duties and responsibilities as a commissioner the CCG is required to understand and to be able to apply the principles of the Mental Capacity Act (MCA) 2005 Code of Practice, and Deprivation of Liberty Safeguards (DoLS) Code of Practice 2009. This will provide assurance that assessments of capacity are carried out appropriately and that decisions made on behalf of people who lack capacity are made in their best interests. Commissioned services are expected to demonstrate compliance with both Codes of Practice and any legal changes as a result of case law.

### **Managing Authority**

The Managing Authority is the person or body with management responsibility for the hospital or care home in which a person is, or may become deprived of their liberty. For further information please refer to MCA Code of Practice.

The Managing Authority has responsibility for having a procedure in place that identifies:

- Whether deprivation of liberty is or may be necessary in a particular case
- What steps they should take to assess whether to seek authorisation
- Whether they have taken all practical and reasonable steps to avoid a deprivation of liberty
- What action they should take if they do need to request an authorisation
- How they should review cases where authorisation is or may be necessary, and
- Who should take the necessary action

### **Supervisory Body**

The Supervisory Body is the local authority responsible for considering requests received from a Managing Authority for a Deprivation of Liberty. For further information please refer to MCA Code of Practice.

The Supervisory Authority has responsibility for:

- Considering requests for authorisations
- Commissioning the required assessments
- Authorising a deprivation of liberty where all the assessments agree

### **Mental Health Assessor**

The Mental Health Assessor is the person qualified to complete the assessment for the purpose of the deprivation of liberty to establish whether the relevant person has a mental disorder within the meaning of the Mental Health Act 1983. The objective of the mental health assessment is to ensure that the person is medically diagnosed as being of 'unsound mind' and so comes within the scope of Article 5 of the European Convention on Human Rights.

A doctor must carry out the mental health assessment, and the assessing doctor has to either be approved under section 12 of the Mental Health Act 1983, or be a registered medical practitioner with at least three years' post-registration experience in the diagnosis or treatment of mental disorder, such as a GP with a special interest. This includes doctors who are automatically treated as being section 12 approved because they are approved clinicians under the Mental Health Act 1983.

The North East regional approach includes the Mental Health Assessor completing two further assessments:

1. The eligibility assessment: there are two parts to this assessment. The first is to see if the authorisation would conflict with an existing requirement of the Mental Health Act 1983. The second part checks whether there should be an application for detention under the Mental Health Act 1983 rather than depriving the person of their liberty using a standard authorisation. This is especially relevant for people receiving treatment for their mental disorder in hospital.
2. The mental capacity assessment: this is to establish whether the person has capacity to decide whether or not they should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment.

The Mental Health Assessor must have completed specific training and refresh that training on an annual basis.

A database in the North East holds details of Mental Health Assessors and section 12 approved doctors.

### **Best Interest Assessor (BIA)**

The Best Interest Assessor (BIA) is the person qualified to undertake the assessment for establishing whether a deprivation of liberty is occurring, or is likely to occur. This role can be undertaken by an employee of the Supervisory Body or the Managing Authority, but **must not**:

- be involved in the care or treatment of the person
- be in a line management relationship with the MHA or with the person proposing the authorisation.

The BIA also has responsibility for establishing:

- If a deprivation of liberty is in the relevant person's best interests
- If it is necessary for them to be deprived of liberty in order to keep them from harm
- If a deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and seriousness of that harm.

### **Independent Mental Capacity Advocate**

The Supervisory Body must consider appointing an Independent Mental Capacity Advocate (IMCA) to support the RPR. 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. The IMCA Service was established under the terms of the Mental Capacity Act 2005 and the Care Act 2014 further created a duty on Local Authorities to consider whether the *adult* may benefit from the support of an independent advocate as part of the adult safeguarding procedure.

The same advocate can provide support under the Care Act as under the Mental Capacity Act, which enables the person to receive a seamless advocacy service.

## **Court of Protection**

The Court of Protection was created by the Mental Capacity Act (MCA) 2005 to oversee actions taken under the Act, including those relating to DoLS, and to resolve any disputes that involve mental capacity matters.

## **The Regulatory Body**

Hospital and care home service providers must be registered with the Care Quality Commission (CQC) under the Health and Social Care Act 2008. Under amended CQC registration Regulations, a service provider must notify the CQC of any request or application for a DoLS and of the outcome of the request. The CQC has a role in monitoring the use of DoLS.

## **12. Related Policies and Procedures**

This policy is supported by the Teeswide Inter-Agency Safeguarding Adults Policy and Procedures and the individual policy and procedural guidance of each partner agency.

## **13. Review of Policy**

In July 2015, the Law Commission opened a consultation on the law of mental capacity and deprivation of liberty following publication of a detailed report by a House of Lords Select Committee in March 2014, which concluded that the DoLS were 'not fit for purpose' and recommended that they be replaced. At the same time, the Supreme Court Judgment in the case of *Cheshire West* held that far greater numbers of people 'fell to be dealt with' under the DoLS system than had previously been thought. This has placed increasing burdens on local authorities and health and social care practitioners administering the DoLS.

The implementation of the MCA (Amendment) Act 2019 will require this policy to be reviewed. At the time of writing it is anticipated that this will be April 2022.

This policy will need to be reviewed in accordance with these recommendations.

## **14. Links to Useful Websites**

- [DHSC MCA & DoLS Emergency Guidance](#) (Updated November 2020) for updated guidance during the coronavirus (Covid-19) pandemic.
- Law Society report: Identifying a deprivation of liberty: a practical guide <http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/>
- Social Care Institute for Excellence: Deprivation of Liberty – current practice in the light of the recent Supreme Court judgment: <http://www.scie.org.uk/news/mediarelease/deprivation-of-liberty-supreme-court-judgment>
- Care Quality Commission: Deprivation of Liberty Safeguards 2013/14: <http://www.cqc.org.uk/content/monitoring-deprivation-liberty-safeguards>
- ADASS publication: Guidance for Local Authorities in the light of the Supreme Court decisions on deprivation of liberty safeguards: [www.adass.org.uk/media/4436/final-dols-guidance-2015.pdf](http://www.adass.org.uk/media/4436/final-dols-guidance-2015.pdf)
- Links to Safeguarding Adult Boards around Britain: <http://www.childprotectioncompany.com/CPC/local-safeguarding-adults-boards>

## 15. Glossary

<b>CCG</b>	Clinical Commissioning Group
<b>CQC</b>	Care Quality Commission
<b>DHCS</b>	Department of Health and Social Care
<b>HBC</b>	Hartlepool Borough Council
<b>IMCAs</b>	Independent Mental Capacity Advocates
<b>MBC</b>	Middlesbrough Borough Council
<b>MCA/DoLS</b>	Mental Capacity Act/Deprivation of Liberty Safeguards
<b>MCA COP</b>	Mental Capacity Act Code of Practice
<b>MCA (Amendment) Act 2019</b>	Mental Capacity (Amendment) Act 2019
<b>MHA</b>	Mental Health Act
<b>MHA COP</b>	Mental Health Act Code of Practice
<b>NHS</b>	National Health Service
<b>RP</b>	Relevant Person
<b>RPR</b>	Relevant Person's Representative
<b>RCBC</b>	Redcar & Cleveland Borough Council
<b>SAB</b>	Safeguarding Adults Board
<b>SAR</b>	Safeguarding Adults Review
<b>SBC</b>	Stockton-on-Tees Borough Council
<b>TSAB</b>	Teeswide Safeguarding Adults Board
<b>Tees</b>	Refers to the boroughs of Hartlepool, Middlesbrough, Redcar & Cleveland and Stockton-on-Tees