

## Deprivation of Liberty Policy

<b>Policy Number:</b>	QP 16
<b>Version:</b>	2.0
<b>Ratified by:</b>	Quality, Finance and Performance Committee
<b>Date ratified:</b>	24 January 2018
<b>Name of originator/author:</b>	DOLS lead
<b>Name of responsible committee / individual:</b>	Chief Nurse
<b>Date issued:</b>	24/01/18
<b>Review date:</b>	24/01/2022
<b>Target audience:</b>	All staff working within or on behalf of Southend CCG plus those contracted by Southend CCG and who are involved with people 16yrs and over who may lack capacity to make decisions for themselves.

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## Glossary of Acronyms

DoL – Deprivation of Liberty  
DoLS – Deprivation of Liberty Safeguards  
MCA – Mental Capacity Act  
SAB – Safeguarding Adults Board

## 1.0 Introduction.

“The deprivation of a person’s liberty is a very serious matter and should not happen unless it is absolutely necessary, and in the best interests of the person concerned.”

### Deprivation of Liberty Safeguards: Code of Practice

The CCGs aspire to the highest standards of corporate behaviour and clinical competence, to ensure that safe, fair and equitable procedures are applied to all organisational transactions, including relationships with patients their carers, public, staff, stakeholders and the use of public resources. In order to provide clear and consistent guidance, the CCGs will develop documents to fulfil all statutory, organisational and best practice requirements and support the principles of equal opportunity for all.

Whilst a Deprivation of Liberty may occur in any care setting, the Deprivation of Liberty (DOL) safeguards 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. On 1st April 2013, Primary Care Trusts ceased to be and as such their role as a Deprivation of Liberty Safeguards: Supervisory Bodies transferred to Local Authorities. CCG’s are not Supervisory Bodies but will work closely with providers and the Local Authorities to ensure the protections offered by the safeguards are implemented appropriately.

On 19th March 2014, the Supreme Court published its’ judgement in the P v Cheshire West and Chester Council and P & Q v Surrey County Council cases.

This judgement significantly clarified the definition of what constitutes a deprivation of liberty by establishing an ‘Acid Test’. In doing so, they have significantly reduced the threshold and significantly widen the scope of whom may be affected. A person in any location other than a registered care home or hospital where the care is funded by the NHS and their situation meets the acid test might potentially require the authorisation of a Deprivation of Liberty.

Where a Deprivation of Liberty is identified, either the care plan must be significantly altered to remove restrictions and end the deprivation or the deprivation will need to be authorised through the Court of Protection.

### Relevant Legislation, Guidance and Policies

- The Mental Capacity Act 2005
- The Mental Capacity Act: Code of Practice
- Deprivation of Liberty Safeguards (DoLS): Code of Practice
- The Mental Health Act 2003
- The Human Rights Act 1998
- The European Convention on Human Rights
- The Care Standards Act 2003
- The Children Act 1989
- SET Safeguarding Adults Guidance 2014
- SET Safeguarding Children’s Guidance
- The Care Act 2014

## 2.0 Policy Statement

The CCG is statutorily responsible for ensuring that the organisations from which it commissions services provide a safe system which safeguards vulnerable children and adults, including adults who lack mental capacity.

The CCG will, therefore, ensure it commissions MCA compliant care and will ensure that providers meet their statutory responsibilities to the people who are without capacity to consent to care and treatment.

The CCG will ensure that all staff employed by the CCG are aware of their responsibilities under the MCA and will ensure staff operate at all times in accordance with the MCA, the accompanying code of practice and understand the principles around Deprivation of Liberty.

## 3.0 Scope

This policy applies to all staff directly employed or working for the CCG and will have implications for all commissioned services

- This policy aims to ensure that no act or omission by the CCG as a commissioning organisation puts at risk an adult without mental capacity to agree to their situation,
- that robust systems are in place to safeguard and promote the rights of adults without capacity,
- that the chance of someone being in a situation which deprives them of their liberty is minimised
- that, if a deprivation of liberty is essential, it is legally authorised.

## 4.0 Principles

**Capacity is decision specific, in other words assessing capacity refers to assessing a person's ability to make a particular decision at a particular moment in time, rather than being a blanket judgement about an individual's ability to make decisions in general.**

In determining whether a DOL has occurred or is likely to occur, decision-makers must consider all of the facts.

“The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance” ( HL v UK para.89).

In order to provide a clearer definition, Lady Hale in the ‘Cheshire West’ case, established the ‘acid test’ for determining if a Deprivation of Liberty is occurring;

- The person lacks the mental capacity to consent to their accommodation and care AND
- They are under continuous supervision and control AND
- They are not free to leave and live elsewhere AND
- Their deprivation is imputable to the state.

## 5.0 Responsibilities of the CCG

In order to carry out its responsibilities with respect to Deprivation of Liberty under the Mental Capacity Act the CCG will:

- Identify a named MCA lead and ensure that relevant policy, procedure and organisational structures support their role as MCA lead.

- Ensure that all staff employed by the CCG are made aware of their responsibilities with respect to the Deprivation of Liberty authorisations and ensure that staff operate at all times in compliance with the Mental Capacity Act and the accompanying code of practice,
- Ensure that training with regard to the Mental Capacity Act and Deprivation of Liberty is available for CCG staff and staff should be updated every 3 years or when there are changes to the law.
- Maintain a clear line of accountability for Deprivation of Liberty matters, built into internal CCG governance arrangements
- Engage with local Safeguarding Adults Board (SAB) and board sub-groups.
- Work with local agencies to provide joint strategic leadership on Deprivation of Liberty and the MCA in partnership with Local Authorities, provider clinical governance teams and safeguarding leads, CQC, and where applicable, the police.
- Ensure that provider contracts specify compliance with MCA legislation and Deprivation of Liberty; and that commissioned services are supported and contracts monitored for compliance with MCA.
- Ensure that learning from cases where Deprivation of Liberty has been an issue will be used to inform future commissioning and practice.
- Ensure that safeguarding and MCA leads work within the local health and social care economies to influence local thinking and practice around Deprivation of Liberty
- Ensure that best practice around Deprivation of Liberty is promoted, implemented and monitored both within the CCG and within commissioned provider services.

## **6.0 Staff responsibilities**

- Where a CCG employee, in performing their duties, feels a deprivation of liberty is occurring (See section on 'acid test' above) then they need to take account of the setting in which care is being delivered.
- If the care is in a hospital or care home setting then the CCG employee should ask the Managing Authority to make an application for authorisation under Deprivation of Liberty Safeguards to the appropriate Supervisory Body (see contacts in appendix 1). They should assure themselves that this has been done.
- Where the CCG employee feels the Managing Authority are not acting on their concerns discussion should take place with the Supervisory Body, ie the local authority lead.
- Where the CCG employee recognises that a potential deprivation of liberty may be occurring in a setting other than a hospital or care home then the Deprivation of Liberty Checklist should be completed (see Appendix 1).
- If it is still deemed that a Deprivation of Liberty is unavoidable then an application to the Court of Protection should be initiated – consult the CCG MCA Lead for further advice.

## 7.0 Making an application to the Court of Protection

1. This should be co-ordinated by a member of staff who has completed the relevant training.
2. Confirm that the person is fully funded by the CCG – alert the CCG Mental Capacity Lead.
3. Confirmation of the Mental Health diagnosis is required from either the GP or consultant in writing.
4. A copy should be obtained of the Mental Capacity Assessment and care plan with details of the rationale for the deprivation and why it is in the person's best interest
5. Alert the legal services that you will be making an application.
6. Arrange meetings with those involved in the person's care and welfare to gather their views and opinions. Consider the need for an advocate. Consider if there is someone who is able to act as the litigation friend.
7. Complete the Court of Protection application forms.
8. CoP3 MCA form\_  
[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=10080](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=10080)  
CoP 10 DoL form\_  
[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court\\_forms\\_id=10500](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=10500)
9. Gather up-to-date copies of the care plans
10. Once all the information is gathered the paperwork will be forwarded to the Mental Capacity Lead for the CCG then to the legal advisors (currently Essex legal services)
11. Track the progress and the details of the applications on the Deprivation of Liberty spreadsheet in the shared drive.
12. Once the application is authorised make a note of the date when the process will need restarting to ensure that the DoL authorisation remains current.

## 8.0 Responsibilities of Providers

Provider organisations are responsible for:

- Ensuring compliance with Deprivation of Liberty legislation within and across their organisation.
- Ensuring that there is clarity as to who holds corporate responsibility for MCA and DoLS functions within the organisation, and that appropriate governance and safeguarding systems are in place to deliver best practice.
- Providing assurance to CCGs that responsibilities with respect to Deprivation of Liberty are being safely discharged.

The CCG will oversee these responsibilities.

## 9.0 Accountability

Final accountability for compliance with CCG statutory responsibilities with respect to the Deprivation of Liberty sits with the Governing Body Chair of the CCG.

The Governing Body Chair will ensure that the health contribution to promoting the rights and welfare of vulnerable adults without capacity is discharged effectively across the local health economy, through the CCG’s commissioning arrangements.

**10.0 Policy Review**

The Deprivation of Liberty Policy will be reviewed 3 yearly, and in accordance with the following on an “as and when required” basis:

- Legislative changes
- Good practice guidance
- Case law
- Serious Incidents
- Safeguarding Adults Reviews, (where applicable)
- Changes to organisational infrastructure

**11.0 Equality Impact Assessment Statement**

NHS Southend CCG is committed to carrying out a systematic review of all its existing and proposed policies to determine whether there are any equality implications. The policy applies to all groups. This policy has been assessed using the former CCG’s Equality Impact Assessment framework and identified as having the following impact/s upon equality and diversity issues:

Age	Disability	Gender	Sexual Orientation	Religion	Race	Marital Status	Total Points	Impact
0	0	0	0	0	0	0	0	low

**Points Scoring**

- 3 – This area has a high relevance to equalities      13-21 points      – High Impact
- 2 – This area has a medium relevance to equalities      7-12 points      – Medium Impact
- 1 – This area has a low relevance to equalities      0-6 points      – Low or No Impact
- 0 – This area has no relevance to equalities

**Rationale:**

Deprivation of Liberty is a Safeguard under the Mental Capacity Act 2005. 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.

The preparation of this document has included an assessment against equality and diversity requirements and Human Rights considerations, to ensure that there is no direct or indirect discrimination against individuals or groups of persons and that no human rights are unlawfully restricted.

**12.0 List of Stakeholders Consulted**

Name	Designation
HR	

### 13.0 Version Control

Version	Date Issued	Author	Comments
2	Oct 17	Andrea Metcalfe	Policy Refresh

Appendix 1

## Checklist

### Introduction

Following the Supreme Court ruling in March 2014, it has been clarified that a person can be deprived of their liberty in a domestic setting where the State is responsible for imposing the arrangements. This would apply to patients living in their own home or in supported living, where the CCG is the Commissioner of their care package.

The following checklist has been developed to assist practitioners in determining if a patient is being deprived of their liberty and should be applied at each point a care package is commenced, adapted or reviewed.

### Section 1 – Mental Capacity

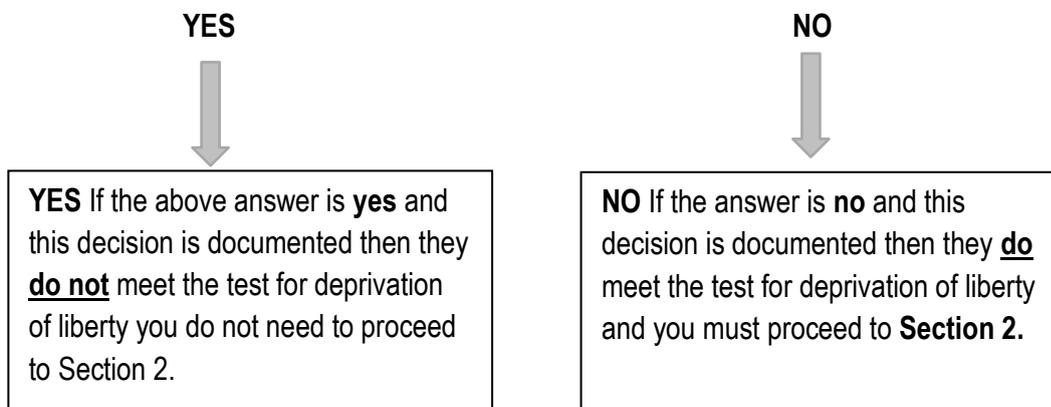
There are two basic questions that staff need to ask in order to assess capacity; also referred to as the two stage capacity test;

- Stage 1 - is there an impairment of or disturbance in the person's mind or brain?
- Stage 2 - is the impairment or disturbance sufficient that the person lacks the capacity to make that particular decision?

A person is deemed not to have capacity for a decision if they cannot meet any one or more of the following:-

- Understand information given to them about the decision
- Retain that information long enough to help make that decision
- Use or weigh up that information as part of the decision making process
- Communicate their decision. This may be by talking, using sign language or even simple muscle movements like blinking an eye or squeezing a hand.

**Does the individual have the Mental Capacity to accept, refuse or choose amongst options related to the package of care they are being offered? (Ensure the documentation is comprehensive or complete a Mental Capacity Assessment if there is a suspicion that they do not have the capacity to make these decisions)**



## **Section 2 - DoL Checklist**

The purpose of this section of the assessment is to determine if a person is under continuous supervision and control AND is not free to leave.

It is no longer relevant whether the person is compliant or whether there is a lack of objection. The focus is not on the person's ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave. The purpose of the placement is not relevant and the person should no longer be compared only with another person who has the same level of disability. The concept of "relative normality" as expressed by the Court of Appeal in the Cheshire West case is no longer good law.

### **Question 1: In your opinion is the person free to leave?**

- This does not mean that they must be trying to leave or even expressing a view about leaving, it is more a test of what staff would do if the person tried to leave.

Yes

No

### **Question 2: Is the person subject to both supervision and control?**

- The Supreme Court did not give guidance on what constitutes complete supervision and control.
- It is no longer relevant whether the purpose of this is to enable them to have greater freedom, to move around more, go out or to take part in activities or if the high level of supervision and control is to meet a high level of care needs.
- It is no longer relevant whether the person would actually physically be able to get up and leave.

Yes

No

### **Question 3: Is the level of supervision and control continuous?**

- A definition of continuous may include someone knowing where they are or what they are doing, either directly or through the use of assistive technology.

Yes

No

**In any case where the answers are NO, YES, YES (in that order) then it is a possibility that the person is being deprived of liberty. In these cases you will need to proceed to Section 3**

### **Section 3 - Next Steps**

When it is determined that an individual may be being deprived of their liberty, it is not always appropriate to jump straight to making an application to the Court of Protection for this deprivation to be authorised.

The first step that should be taken would be to review the person's care/treatment plan to determine whether this can be provided in a less restrictive way.

In cases where care cannot be met in a less restrictive way and the three stage test has established that they may be being deprived of their liberty an application will need to be made to the Court of Protection for this to be authorised.

### **Is it possible to meet the individual's needs in a less restrictive way?**

↓ YES

If the answer is **yes** reapply the DoLS Checklist in Section 2

↓ NO

Contact the CCG Mental capacity Act Lead and commence the process to make an application for authorisation of a Deprivation of Liberty through the Court of Protection

## **Contacts**

If you require further help with applying this checklist or to understand what the next steps of the process are then please contact:-

Southend CCG Lead for Mental Capacity Act

Telephone: 01702 314317

Supervisory Body (for Deprivation of Liberty in Care Homes or Hospital)

## **Urgent Authorisation**

You can alert the Local Authority to an Urgent Authorisation by:

- Hand delivering the completed Urgent Authorisation and accompanying request for a Standard Authorisation to Southend-on-Sea Borough Council, Civic Centre, Victoria Avenue, Southend-on-Sea, Essex, SS2 6ER
- Emailing them to Adult Social Services at [SAB@southend.gov.uk](mailto:SAB@southend.gov.uk) (files should be password protected)
- Faxing them to 01702 534794

## **Standard Authorisation**

You can request a Standard Authorisation by:

- Emailing them to Adult Social Services at [SAB@southend.gov.uk](mailto:SAB@southend.gov.uk) (files should be password protected)
- Faxing them to 01702 534794
- ❖ Always phone the Access Team on 01702 215008 to check that the applications have been received.