This document has not been reviewed as it may soon be obsolete. The government has proposed, via The Mental Capacity (Amendment) Bill, that DOLS should be replaced by a new statutory system: The Liberty Protection Safeguards.

This document remains useable until the introduction of the new statutory system and the revision of this guidance / introduction of new guidance.

Derbyshire County Council Adult Care

Deprivation of Liberty Safeguards (DoLS) Practice Guidance

Approval and Authorisation

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V1	November 2015	Sue Pearson	Introduction of new guidance
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This document will be reviewed on a regular basis – if you would like to make any comments, amendments, additions etc. please email Phil Robson Policies and Procedures – phil.robson@derbyshire.gov.uk

This Practice Guidance is intended to support Derbyshire County Council staff in working with people who lack capacity and who may be deprived of their liberty. It is not a substitute for referring to the Deprivation of Liberty Safeguards Code of Practice for guidance, particularly in complex and contentious cases.

Introduction

Background

The Deprivation of Liberty Safeguards, or DoLS as it is more commonly referred to, was the Government's response to a 2004 European Court of Human Rights ruling HL v UK 2004. This found that a man with severe autism had been unlawfully deprived of his liberty (DoL) when he was detained in Bournewood Psychiatric Hospital as an informal patient for four months.

This situation became known as the "Bournewood Gap". HL was unable to consent to his admission to hospital; he was accommodated against the wishes of his carers who knew HL very well, and there was no recourse to procedural safeguards to challenge his detention. Consequently, the Bournewood Gap was filled by new legislation. DoLS was incorporated into the Mental Capacity Act 2005, via amendments in 2007, and became operational on 1st April 2009.

What is Liberty?

For our purposes here, "liberty" refers to Article 5 of the European Convention on Human Rights (ECHR): the right to "liberty and security". This is a qualified rather than an absolute right, which means that it can only be breached using lawful procedures, such as using police powers of arrest, the Mental Health Act 1983 or DoLS. All such legislation allows people the right to a prompt appeal against their detention.

What is a Deprivation of Liberty?

A person can only be lawfully deprived of their liberty in a care home or hospital if it has been authorised by either the DoLS process or a Court of Protection order.

Article 5(1) of the ECHR has been identified as having three elements, all of which need to be satisfied before a particular set of circumstances amounts to a deprivation of liberty:

- The objective element: the person is confined to a particular place for a non-negligible period of time;
- The subjective element: the person does not consent (or cannot, because they do not have the capacity to do so) to that confinement;
- State imputability (responsibility): that the deprivation of liberty can be said to be one for which the State is responsible. The local authority is the State's representative for these purposes.

Placements are imputable to the State even when people are self-funding and the local authority has no knowledge or involvement in the arrangements. The Law Society's Deprivation of Liberty: A Practical Guide explains the rationale for this:

> *"… private care home[s] and hospitals are institutions regulated by the State. As such, any notionally 'private' deprivations of liberty taking place in such institutions are – or should – be ones of which the State is aware. This, in turn, triggers the State's positive obligations to secure the Article 5 ECHR rights of the individuals concerned, which are discharged by operation of the [DoLS] authorisation procedure."* (p.22)

In a landmark ruling in March 2014 (Cheshire West and Chester Council v P), the Supreme Court redefined what is a deprivation of liberty. This *acid test* had often been used in other cases, including in HL v UK 2004. However, the Supreme Court reinterpreted it, and effectively lowered the threshold for what constitutes a DoL.

The aci*d test* regarding people who lack capacity to consent to being accommodated for care or/and treatment asks two questions:

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

Baroness Hale, who gave the leading judgment, identified the following factors as being relevant:

- Control over who the incapacitated person can have contact with;
- Control over the activities that the person is allowed to participate in;
- Not being able to leave the placement without supervision;
- Not being free to leave the placement permanently in order to reside elsewhere in a different type of setting.

The Law Society in its Identifying a Deprivation of Liberty – a Practical Guide suggests that, to determine whether someone is under continuous supervision and control, one should ask the provider if they have a plan in place which means that they need always broadly know:

- Where the individual is; and
- What they are doing at any one time.

If the answer to both questions is "yes", the Law Society suggests that this strongly indicates that the individual is under continuous supervision and control. This is particularly so if the plan sets out what the provider will do in the event that they are not satisfied that they know where the individual is and what they are up to.

The Law Society further states that:

"We also suggest that it is clear that the test for completeness / continuity will also be met without every decision being taken for the individual. In other words, the individual may well be able to take quite a number of decisions as to their own activities (for instance what they would like to have for breakfast) but still be subject to complete or continuous supervision and control if the individual is in an overall structure in which aspects of decision-making are being allowed to them at the discretion of those in control of their care." (p.26)

With regard to not being free to leave, the Law Society advises:

"If a person is not free to come and go as they wish (with or without help) from a placement or place of treatment save with the permission of the decision-makers around them, then this is, at a minimum, a pointer to the individual being subject to restrictions upon their liberty. This may – depending upon the other measures imposed upon them – amount to a deprivation of their liberty or it may be that they amount solely to a restriction upon their liberty and the body imposing the restrictions can rely upon the provisions of ss.5-6 MCA 2005;

A person will clearly not be 'free to leave' if they are able permanently to relocate from the place only with the permission of the person(s) or bodies responsible for their care and treatment; and if they do seek to leave that location permanently, and not to return, steps will be taken to locate and bring about their return if they do not do so of their own accord." (p.28)

In contrast with previous DoLS case law, the Supreme Court was clear that the following are not relevant as far as the *acid test* is concerned:

- The person's compliance or lack of objection to their deprivation;
- The relative normality of the placement; and
- The reason or purpose for the particular placement.

Instead, the focus should be upon the actions, or potential actions, of those around the individual, rather than on the individual themselves or what is evidently in their best interests. In other words, one may ask a hypothetical question: if the person expressed a desire to leave, or a family member interested in their care sought to assist them to leave, would they be allowed to go?

Purpose of the Deprivation of Liberty Safeguards (DoLS)

DoLS was introduced to ensure that people in care homes and hospitals are looked after in ways that do not inappropriately restrict their freedom. DoLS cannot be used to authorise deprivations of liberty in the community; only the Court of Protection can sanction a DoL in supported living, shared lives or in a person's family home (this is explored further on p.16).

DoLS should:

- Ensure that care homes and hospitals only deprive people of their liberty in their best interests, when such arrangements are evidently the least restrictive option and a proportionate response to the risk of harm;
- Prevent arbitrary decisions that subject vulnerable people to restraints, restrictions or control impacting on their place of residence, freedom of movement or right to respect for private and family life, to such an extent that they are deprived of their liberty. This is achieved by a process of independent assessments and scrutiny;
- Ensure principles of the Mental Capacity Act are followed;

- Protect people who need to be deprived of their liberty by giving them or their representatives, rights of appeal, and for their deprivation to be reviewed and monitored;
- Provide means by which disputes can, if not resolved, be taken to the Court of Protection for scrutiny and judgment;
- Provide legal protection for staff whose restraining, restricting or controlling actions could otherwise be considered unlawful.

Who can the Safeguards apply to?

- People aged 18 and over in CQC registered hospitals and care homes, who have an impairment of the brain or mind, are not free to leave, and do not have capacity to consent to their care or treatment;
- People who are not detained under the Mental Health Act 1983.

How should a DoL be regarded?

Deprivations of liberty should only be considered as a last resort and only after less restrictive arrangements have been carefully considered, and tried if reasonably possible. Once this has been done, deprivations of liberty authorisations should not be regarded as a failure or as a criticism of the care provided. Some people need significant restrictions placed on them that are necessary, proportionate to the severity and likelihood of harm and are the least restrictive option available. The law allows for these restrictions to be applied, even though they may be to such an extent that a person's liberty is taken away from them. As depriving someone of their liberty is a serious matter, staff in hospitals and care homes need to apply for permission to do so through a DoLS authorisation. This provides both staff and the detained person with legal protection.

DoLS and the Care Quality Commission (CQC)

DoLS can only be used in hospitals and care homes that are registered with the Care Quality Commission under the Health and Social Care Act 2008. Some over 18s live in care homes that are registered by Ofsted. Only the Court of Protection can sanction a DoL in such homes. The Care Quality Commission (CQC) monitors the use of Deprivation of Liberty Safeguards. It does not usually investigate individual cases; inspections by the CQC are not intended to constitute additional reviews or appeals of DoLS.

Concerns about an individual case that cannot be resolved with the managing authority or supervisory body may need to be referred to the Court of Protection. Under CQC registration regulations, a service provider must notify the CQC of a request or application for DoLS and also the outcome of the request.

Compliance with the Mental Capacity Act and DoLS form an integral part of CQC inspections. Practice can be thoroughly scrutinised and judged as to whether it

meets the required standard. This applies to both the Managing Authority and the Supervisory Body.

Whose responsibility is it to ensure that a potential deprivation is lawful, and how do they do this?

It is the responsibility of the *managing authority* (DoLS language for the care home or hospital) to ensure that any deprivation of liberty is lawful. If someone is identified as being deprived of their liberty, or at risk of being deprived of their liberty, the managing authority (the hospital or care home managers) must consider whether such a DoL is in the person's best interests, and necessary to protect the person from harm. If there are alternative less restrictive care options that do not amount to a deprivation of liberty, DoLS should not be used; authorisation should never be used simply for the convenience of staff or carers. However, DoLS does not passport people to more expensive care options.

For a deprivation to be lawful, the care home or hospital (*managing authority*) must seek authorisation from the *supervisory body* (DoLS language for the local authority where the person is ordinarily resident). Ordinary residence can sometimes be difficult to determine and legal advice may need to be sought. Managing authorities are expected to inform the supervisory body as to who is commissioning the hospital treatment or funding the residential care, as this is pertinent to ordinary residence.

If there is any uncertainty as to whether the care regime amounts to a deprivation of liberty, the managing authority should apply for authorisation. Assessments will then be carried out to ascertain whether or not the person needs to be deprived of their liberty.

Potential Restrictions of Liberty that may be Relevant to a DoL

The following are examples of potentially liberty-restricting measures that might exist in residential care homes for older adults:

- A keypad entry system;
- Assistive technology such as sensors or surveillance;
- Observation and monitoring;
- An expectation that all residents will spend most of their days in the same way and in the same place;
- A care plan providing that the person will only access the community with an escort;
- Restricted opportunities for access to fresh air and activities (including as a result of staff shortages);
- Set times for access to refreshment or activities;
- Limited choice of meals and where to eat them (including restrictions on residents' ability to go out for meals);
- Set times for visits;
- Use of restraint in the event of objections or resistance to personal care;

- Mechanical restraints such as lapstraps on wheelchairs;
- Restricted ability to form or express intimate relationships;
- Assessments of risk that are not based on the specific individual; for example, assumptions that all elderly residents are at a high risk of falls, leading to restrictions in their access to the community.

Questions for Front-line Staff

These questions may help establish whether an individual is being deprived of their liberty:

- Are any of the liberty-restricting measures described above applied to the resident concerned? If so which and for what reason?
- Are there any restrictions on the person's contact with others? If so, do they restrict contact beyond the home's usual visiting arrangements?
- Is the person's access to the community restricted in any way? For example, must they be escorted? What would staff do if they left the home alone or sought to do so?
- Is the person required to be at the care home at specified times?
- Must the person be escorted either within or outside the care home?
- Is the person required to say where they are going when leaving the care home?
- Is the person required to take part in a programme of treatment? What happens if they do not?
- Is the person required to take medication? What are the arrangements for this? What happens if they do not take it?
- Is the person required to remain abstinent from alcohol or drugs?
- Are there drugs tests?
- Is any other legal framework currently being used e.g. conditional discharge, community treatment order or guardianship? If so, what are the precise terms?
- Is the person required to observe an exclusion zone? If so, how large is it and what implications does it have, for example, for visits to and from family members?
- Is the person required to avoid specific settings?
- Are decisions about contact with friends and family taken by others?
- Is choice extremely limited even in terms of everyday activities?
- Is restraint used to deliver personal care?
- Are the person's wishes often overridden, in their best interests?
- Could any of the liberty-restricting measures be dispensed with?

For more questions specific to different types of placements, see the Law Society Guidance

DoLS Forms

DoLS involves several steps. Documentation is available on the case management system for Derbyshire County Council Staff. Independent Assessors can access the forms via the ADASS website.

What Happens after an Authorisation has been Requested?

On receiving a valid request for authorisation, the supervisory body must arrange a series of assessments.

Age Assessment

This is to confirm the person is over 18, as the safeguards only apply to over 18s.

No Refusals Assessment

This is to establish whether the person, or someone with authority to decide on their behalf, has refused the deprivation of liberty. Authorisation cannot be given if it conflicts with:

- A valid and applicable advance decision refusing the particular care or treatment;
- The decision of an attorney under a Lasting Power of Attorney for Health and Welfare;
- The decision of a court-appointed deputy for Health and Welfare.

Mental Capacity Assessment

This is to establish whether the person lacks mental capacity to decide for themselves if they should be accommodated in the particular care home or hospital, for the purpose of the necessary care or treatment. An authorisation cannot be given if they are able to make this decision themselves.

The Mental Capacity Act 2005 requires that capacity assessments that are focused on the specific decision to be made, at the time needed, and not on generalisations or assumptions about capacity.

Mental Health Assessment

Authorisation can only be given if the person is suffering from a mental disorder (within the meaning of the Mental Health Act 1983).

Eligibility Assessment

The person is not eligible for authorisation if they are:

- Detained under the Mental Health Act 1983;
- Subject to a requirement under the Mental Health Act 1983 as to where they live; or
- The person is subject to s17 leave, conditional discharge, community treatment order, or guardianship, and a standard authorisation would be incompatible with a Mental Health Act requirement (e.g. as to residence).

Best Interests Assessment

The best interests assessor establishes whether deprivation of liberty is actually occurring, or is likely to occur. The best interests assessor also establishes if deprivation of liberty is in the person's best interests, necessary to keep the person from harm and a proportionate response to the likelihood and seriousness of that harm.

The best interests assessor must take into account the views of:

- The person themselves;
- Anyone named by the person to be consulted;
- The person's carers;
- Anyone interested in the person's welfare;
- Attorneys (if there are any);
- Deputies (if there are any).

If the person has no family or friends to be involved in the assessment, an Independent Mental Capacity Advocate (IMCA) must be appointed to support and represent them during the assessment process.

The best interests assessor can specify conditions that must be included in the authorisation, such as steps the managing authority should take to reduce the restrictions. Such conditions are mandatory for the managing authority to implement with partner agencies. The best interests assessor also recommends the length of time the authorisation should last up to a maximum of 12 months.

Who Carries out the Assessments?

There will always be a minimum of two assessors because the mental health and best interests assessments must be carried out by different people.
There are specific requirements for the qualifications, experience and training of people carrying out each of the tests. For example, the best interests assessment must be carried out by an approved mental health professional, social worker, nurse, occupational therapist or psychologist, with the required training and experience.
The full details of who can carry out each assessment are detailed in the DoLS Code of Practice (para 4.60).

The best interests assessor can be an employee of the supervisory body or the managing authority, but must not be involved in the care or treatment of the person. There will sometimes be situations where the managing authority and the supervisory body are the same organisation, for example, where a care home is run by a local authority. In such cases, the best interests assessor must not be an employee of that authority; an independent assessor must be appointed.

What is the Timescale for the Assessments?

The procedures for a standard authorisation should be completed within 21 calendar days of the application being received by the supervisory body (*local authority*).

An urgent authorisation can be issued by the managing authority (*hospital or care home*) itself if it is necessary to deprive the person of their liberty before a standard authorisation can be obtained. They must simultaneously apply for a standard authorisation (if not already done). The urgent authorisation allows lawful deprivation to take place while the assessments are carried out. An urgent authorisation can last up to seven days, but can be extended once by the supervisory body for another seven days if the assessment procedures have not been completed.

What Happens once an Assessment is Finished?

Once all assessments have been completed, they are submitted to the supervisory body and scrutinised by an *authoriser*, usually a Group Manager within the local authority. The authoriser receives special training for this important role and must act independently from the area's social work team in making the authorisation, in accordance with the ruling of London Borough of Hillingdon v Neary 2011.

If an authorisation is granted, it must state how long it will last, up to a maximum of 12 months, and will include any conditions attached to it.

A copy of the authorisation must be given to:

- The relevant person;
- The managing authority;
- The Relevant Person's Representative (RPR); and
- Every *interested person* consulted by the best interests assessor.

Several qualifying requirements have to be met for an authorisation to be granted. An authorisation gives a legal structure in which care or treatment amounting to a deprivation of liberty can lawfully occur. It does not give legal authority to provide care or treatment. Care and treatment still needs to be given in accordance with the Mental Capacity Act 2005.

Schedule A1 (paragraph 53(3)) of the Mental Capacity Act puts the responsibility for the implementation of conditions on managing authorities. There are occasions when Adult Care is also required to act, for example, to reduce unnecessary restrictions or to hold a best interests meeting to comply with the Mental Capacity Act. Consequently, Form 3includes a section for recommendations or actions for other staff involved in that person's care, such as social workers or health professionals. These may include, for instance, to facilitate contact with family or to assess whether alternative accommodation might be in the person's best interests. If the conditions are not complied with, then the deprivation of liberty could cease to be in the person's best interests. The paid representatives pay particular attention as to whether or not conditions have been complied with, and report on that matter in their monthly reports to the Supervisory Body. This could lead to the matter being referred to Court by way of an appeal against the DoLS authorisation.

Authorisations can be reviewed at any time if there is a significant change in the person's circumstances. An authorisation may stipulate that it is only lawful if named conditions are met. Conditions that are attached to the authorisation may, for example, relate to conflicts with the family about the placement, involve contact issues, require recording of behaviours or require a particular response from the home or hospital.

Just before the end of the authorised period, a new standard authorisation must be applied for if deprivation is still required and the assessment procedure must be repeated. Otherwise, any continued deprivation of liberty, without authorisation, would be unlawful.

If DoLS assessments have been completed less than 12 months previously, and the supervisory body is satisfied that salient factors remain the same, those assessments can be re-used as *equivalent assessments,* for a further authorisation period.

What Happens if an Authorisation is Refused?

If any of the criteria for the six assessments are not met, the supervisory body must refuse an authorisation. Any continuing deprivation of liberty will be unlawful. If an authorisation cannot be given, notice of this fact must be given to the same people as listed above.

The managing authority must ensure that the person's care is arranged in a way that does not amount to a deprivation of their liberty. The supervisory body, or a relative, or anyone else who is commissioning the care, such as Health, has a responsibility to purchase a less restrictive care package to prevent deprivation of liberty.

Relevant Person's Representative (RPR)

If an authorisation is granted, the supervisory body will also appoint a relevant person's representative (RPR). The RPR must be given written notice of the authorisation including the purpose of the deprivation of liberty and the duration of the authorisation. The RPR's role is to maintain contact with the person, and to represent and support the person in all matters relating to the actual deprivation of liberty and the authorisation. Every time the RPR visits, they will be checking with the care home whether they and the Adult Care worker have complied with the conditions in the authorisation.

The RPR can apply for a review of the deprivation of liberty. This could be necessary if there is a change of circumstances and the managing authority has not informed the supervisory body of this.

If the person is unhappy with being deprived of their liberty, for example, they are still requesting to leave, or their family are complaining about them still not being allowed to go home, the RPR may decide to appeal to the Court of Protection and seek an Order to terminate the authorisation and resolve the dispute. Non means-tested legal aid is available for this appeal as it concerns a deprivation of liberty. If welfare proceedings are taken instead, the legal aid would have to be means tested. However, all parties in dispute are expected to try to reach an agreement, and application to the Court of Protection should be a last resort. If an agreement cannot be reached despite everyone's best efforts, legal advice should be promptly sought.

Both the RPR and the relevant person have the right to be supported by an IMCA, unless the RPR is a paid representative. An IMCA is an independent professional who can support the unpaid RPR by making sure they understand their role and can carry it out effectively.

Who Should be Chosen as the RPR?

The RPR will usually be a relative or friend of the person who is being deprived of their liberty. If there is no appropriate friend or relative, the supervisory body will appoint a paid professional. It must be someone who can keep in regular contact with the person. The RPR will be chosen by:

- The person whose liberty is being deprived, if they have capacity to choose; or
- Their attorney or deputy, if there is one with authority to make this decision; or
- The best interests assessor; or
- The supervisory body.

But the RPR must not be:

- Financially interested in the managing authority (for example, the director of the care home) or related to someone who is;
- Employed by (or providing services to) the care home (where the managing authority is a care home);
- Employed by the hospital in a role related to their care (where the managing authority is a hospital); or
- Employed by the supervisory body in a role that is, or could be, related to the relevant person's case.

The person chosen or recommended to be the RPR can refuse the role, in which case an alternative person must be identified.

Replacement of the RPR

If the RPR cannot keep up their duties, for example, if they move away and can no longer visit the person regularly, they should be replaced. If so, the RPR should notify the supervisory body. If the care home or hospital has concerns that the RPR is not carrying out the role properly, they should discuss this with the RPR and, if still not satisfied, they should notify the supervisory body.

The person whose liberty is being deprived can also object to the RPR (if they have the capacity to make this decision), in which case the supervisory body should replace the RPR.

The replacement RPR should be selected following the recommendation of someone qualified to be a best interests assessor. An IMCA should be appointed while there is no RPR in place, if the person has no family or friends to support them.

The 'AJ Case'

The case of AJ v Local Authority [2015] EWCOP 5 provides important guidance about the role of RPRs, IMCAs, as well as the role of local authorities in ensuring that people lacking capacity are able to challenge their deprivation of liberty.

In this case, the relative appointed as AJ's RPR was directly involved in the decision to place her in a care home, initially for respite, against her wishes. Prior to this move, AJ lived in an annex to the relative's house; he and his wife, AJ's niece, were her main carers. The judge concluded that AJ's Article 5(4) rights to appeal against her deprivation had been thwarted, since the RPR's interests conflicted with those of AJ. It was found that the local authority should have appointed an alternative RPR because they knew about this disagreement. It was also a situation where a short-term care home placement became permanent without the proper DoLS authorisation.

Reviewing and Monitoring a Deprivation of Liberty

Authorisations of deprivations of liberty must be ended when no longer necessary. The duration specified is the maximum allowed without further authorisation.

Managing authorities should monitor DoLS authorisations and identify if or when a review by the supervisory body is required. If there is a change in circumstances that could mean the deprivation of liberty is no longer necessary, or a condition to the authorisation should be added or amended, the managing authority should inform the supervisory body, which must arrange for a review to be carried out. This would typically be because the person would fail one of the assessments. For example, if they have regained capacity, should now be detained under the Mental Health Act, or it could be that the managing authority are exercising more restraint and control and need a fresh best interests assessment to determine whether the DoL remains lawful.

A review can also be requested at any time by the person deprived of their liberty, their RPR or an IMCA. Form 10 can be used to request a review, which can be downloaded from ADASS (Association of Directors of Adult Social Services).

The person deprived of their liberty, their RPR, the IMCA if one is involved, and the managing authority must be informed by the supervising authority that a review is going to be carried out, and of the outcome of the review.

The outcome of the review could be to end the authorisation, to change or add conditions to it, or change the reasons for which authorisation is given. The review does not extend the current authorisation. If the authorisation is ended, any continued deprivation of liberty will be unlawful. It is not necessary for a managing authority to wait for the authorisation to be removed before they end the deprivation of liberty. If the care home or hospital decides it is no longer necessary to protect the person from harm, steps must be taken to make sure the person is no longer deprived of their liberty. They can then apply for a review to have the authorisation formally ended.

Temporary Changes in Mental Capacity

A person's mental capacity to make certain decisions will often fluctuate. If someone being deprived of their liberty regains capacity to decide for themselves whether they should stay in the care home or hospital they would no longer meet the requirements for authorisation of their deprivation.

However, if this was only temporary, it could be impractical for a supervisory body to repeatedly go through the review procedure, and remove the authorisation if it would soon be required again as the person's capacity fluctuates. A balance should be struck, based on individual circumstances.

In a situation like this, the DoLS Code of Practice advises that a suitably qualified person must make a clinical judgement on whether there is evidence of a longer term regaining of capacity. If the person is only likely to have capacity on a short-term basis, the authorisation should be kept in place.

Challenging a Deprivation of Liberty

An authorisation can be challenged if:

- It is thought that someone is being unlawfully deprived of their liberty when there is no authorisation in place; or
- If an authorisation is in place, but the requirements are not met. For example, if the person has capacity to decide for themselves not to remain in the care home or hospital, or if deprivation of liberty is not in their best interests.

Any third party (such as a member of staff, social worker, family member, friend or carer) who thinks someone is being deprived of their liberty without authorisation can ask the care home or hospital to apply for authorisation, or to change the care regime so that the person is not being deprived of theirliberty.

If this is not done, they can write, using the DoLS Letter 2 template to the supervisory body for an assessment of whether the person is being deprived of their liberty. This assessment must be carried out within seven calendar days.

If there is a deprivation of liberty, the full assessment procedure will go ahead.
If you think an unauthorised deprivation of liberty is taking place and you raise this with the care home or hospital, you should expect them to deal with it urgently: the Code of Practice states that this would usually mean within 24 hours.

The person appointed to assess whether a deprivation of liberty is taking place should consult the person who raised the concern, the person themselves and any friends and family. If there is no family or friend to be consulted, an IMCA must be appointed.

If an authorisation is given and the third party do not think it is in the person's best interests, the third party should ask the supervisory body and the managing authority for evidence of what alternatives to deprivation were considered, and why they were rejected. An appeal against the authorisation can be taken to the Court of Protection.

Taking a Case to the Court of Protection

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

A case should usually only be taken to the Court of Protection if it has not been possible to resolve the matter with the managing authority and supervising authority, either by asking for assessments to be carried out, or for a review of an existing authorisation. The local authority will be expected to have done everything in its power to resolve any dispute with the allocation of a social worker to the case if one has not been allocated already. Fieldwork staff will have to demonstrate what they have done to try to resolve the dispute, including how they have established that the person does not have capacity to make the relevant decision, and how they have acted in the person's best interests. Should you find yourself as a worker in this situation, you should contact Adult Care legal services as their advice, based on a thorough knowledge of the Court of Protection's requirements, can often help avoid court altogether, or minimise the length and cost of any proceedings. They will also advise on what level of involvement the local authority should have in any legal proceedings, and assist the worker to do what they can do to ensure that the law has been complied with, including that the local authority's case is as strong as possible.

Death of a Person under DoLs

In December 2014, the Chief Coroner issued guidance to local coroners as to how to proceed with inquests when people die, subject to DoLS. He stated:

"… on the law as it now stands, the death of a person subject to a DoL should be the subject of a coroner investigation because that person was in state detention within the meaning of the Coroners and Justice Act 2009." (Chief Coroner's Guidance No. 16, para. 45)

He went on to say:

"In many cases of this kind which are uncontroversial the inquest may be a 'paper' inquest, decided in open court but on the papers without witnesses having to attend. Intelligent analysis of relevant information (without the need for a post-mortem examination) may be the best approach. Bereaved families should have all of this explained to them in advance." (para.71)

Since that time, it has been clarified that the local Coroner should be notified, even if a DoLS application has been made but has not yet been authorised or even assessed. It is up to the managing authority (the care home or hospital) to notify the local coroner using Form 12 available on the ADASS website. Local Coroners have sometimes varied in their interpretation of the guidance, with the result that complaints have been made by relatives at what the relatives regard as unnecessary and expensive delays before they could bury their loved ones as their faith, customs or wishes demand. However, most coroners seem to be taking a pragmatic approach to complying with the Guidance and keep paperwork and delays to a minimum.

Deprivation of Liberty in Domestic Settings

As mentioned earlier, DoLS can only be used to authorise deprivations of liberty in care homes and hospitals. Only the Court of Protection can authorise a DoL in the community. The Supreme Court's ruling lowered the threshold for what constitutes a DoL in the community. It held that deprivations of liberty can occur in domestic settings where the State is responsible for imposing such arrangements, such as *Supported Living* and *Shared Lives schemes*.

The Law Society advised that this can include circumstances when the person is in the community, predominantly cared for privately, but where there is some State involvement. That State involvement may be extensive, such as the payment of direct payments to an appropriate person on the individual's behalf for the purpose of arranging their care. It may be much more limited, such as visits by a nurse on a monthly basis. The precise point on this spectrum at which the arrangements will cease to be the imputable to the State (and hence which trigger the positive, rather than negative obligations of the State bodies concerned) is something that has yet to be decided by the courts. Legal advice should be sought in this type of situation.

Where a deprivation of liberty can truly be said to arise out of arrangements that the State has had no part in making, the obligation on the State bodies is to take measures "providing effective protection" of the individual. In Re A and Re C 2010 Munby LJ held that:

"Where the State – here, a local authority – knows or ought to know that a vulnerable child or adult is subject to restrictions on their liberty by a private individual that arguably give rise to a deprivation of liberty, then its positive obligations under Article 5 will be triggered." (para 95)

These include the duty to investigate, to determine whether there is a DoL. In this context, the local authority would need to:

1) Consider all of the factors relevant to the objective and subjective elements of the test for a DoL; and

2) If, having carried out its investigation, the local authority is satisfied that the objective element is not present, there is no DoL, the local authority would have discharged its immediate obligations. However, its positive obligations may, if appropriate, require the local authority to continue to monitor the situation in case circumstances change.

Where there is, or is likely to be, a deprivation of liberty in the community, this can only be authorised by the Court of Protection. Workers should err on the side of caution and seek legal advice should they believe that a person is being unlawfully deprived of their liberty in the community. It may also be useful to be aware that, after the Supreme Court effectively lowered the threshold for what constitutes a DoL, the number of such cases has caused logistical pressures for the Court of Protection.

Impact of 'The Cheshire West' Supreme Court Ruling, March 2014

As mentioned earlier, this ruling lowered the threshold of what constitutes a deprivation of liberty. Consequently, hundreds of thousands of people suddenly needed DoLS assessments. The number of applications for authorisations has increased nine-fold nationally, to the extent that most supervisory bodies have been overwhelmed with cases that they have not been able to process. Local authorities have been advised that provided they have a system of prioritising their cases, and they are taking steps to respond to the judgment, they are unlikely to be unfairly penalised in the courts. It remains the case however, that most supervisory bodies are not able to process as many cases as are being referred and standard referrals are being 'parked' for varying lengths of time. Should anyone working with the person believe that the arrangements have become more acute, since the referral was made and not actioned, they should contact the DoLS Team who are holding the referral to put forward the case for prioritisation.

ADASS guidance, issued November 2014, provides a screening tool for referrals, which most local authorities are using to 'triage' cases in order to prioritise allocations. The tool is also being used by managing authorities to prioritise referrals for authorisations. ADASS listed the following factors as being highly indicative of the need to be treated as urgent:

- Psychiatric or Acute Hospital and not free to leave;
- Continuous 1:1 care during the day and/or night;
- Sedation/medication used frequently to control behaviour;
- Physical restraint used regularly (equipment or persons);
- Restrictions on family/friend contact (or other Article 8 issue);
- Objections from relevant person (verbal or physical);
- Objections from family/friends;
- Attempts to leave;
- Confinement to a particular part of the establishment for considerable period of time;
- New or unstable placement;

- Possible challenge to Court of Protection, or complaint;
- Already subject to DoLS, about to expire.

As a result of widespread criticism of DoLS and whether they are fit for purpose, exacerbated by the recent Cheshire West ruling, the Government asked the Law Commission to review the legislation and guidance. A Consultation Paper was launched in July 2015.

Useful Links and Acknowledgments

DoLS Code of Practice
http://webarchive.nationalarchives.gov.uk/20130107105354/http:/www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

ADASS website (New Forms)
http://www.adass.org.uk/mental-health-Drugs-and-Alcohol/key-documents/New-DoLS-Forms/

ADASS website (DoLS guidance)
http://www.adass.org.uk/DoLS-advice-note-november-2014/

Law Society – Identifying Deprivation of Liberty – a Practical Guide
http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty/

Age UK Factsheets
http://www.ageuk.org.uk/publications/age-uk-information-guides-and-factsheets/

DoLS Forms and record keeping- Department of Health Guidance, 2009 -
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223353/dh_113208.pdf

Alzheimer's Society
http://www.alzheimers.org.uk/dolsreview

Birmingham South Central CCG Factsheet
http://bhamsouthcentralccg.nhs.uk/2012-02-08-14-59-22/mental-capacity-act/activities-and-resources/factsheets