

The ROYAL MARSDEN

NHS Foundation Trust

Understanding the Mental Capacity (Amendment) Act 2019 and the Deprivation of Liberty Safeguards 2007

Patient Information



NHS

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Introduction

This booklet explains the Mental Capacity (Amendment) Act 2019 (MCA) and Deprivation of Liberty Safeguards 2007 (DoLS). Importantly, it aims to:

- Help you understand your rights to have a say in your friend or family member's care
- Give advice about protective measures to protect your friend or family member's interests
- Explain what to expect whilst at The Royal Marsden in relation to MCA or DoLS
- Under the Deprivation of Liberty Safeguards, ensure that all possible steps are being taken to protect the interests of your friend or family member whilst admitted to hospital.

This booklet has been recommended because a family member, friend or someone you provide care for is being looked after in hospital and may be subject to the Mental Capacity (Amendment) Act 2019 and/or the Deprivation of Liberty Safeguards 2007.

Mental Capacity (Amendment) Act 2019

This legislation applies to all people that may lack capacity to make a specific decision. In relation to the hospital, staff would usually test a patient's mental capacity in relation to receiving treatment or carrying out a test if they are concerned that a patient may have a cognitive difficulty (such as dementia) that is impacting their ability to make a decision. If it is found that a person lacks capacity for a specific decision, staff will proceed to make a **best interest decision**. This is when you will be asked for your view about best interests and a decision will be made. No one can consent on behalf of someone else that lacks capacity, even if they are noted as the patient's next of kin.

Anyone working under this legislation needs to ensure they act within the following Mental Capacity Act principles:

- **Presumption of capacity:** A person must be assumed to have capacity unless it is established that they lack capacity.
- **Maximising decision-making capacity:** A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- **Unwise decisions:** A person is not to be treated as unable to make a decision because they make what is seen as an unwise decision.
- **Best interests:** An act done, or decision made on behalf of a person who lacks capacity must be done so in the person's best interests.
- **Less restrictive alternative:** All reasonable steps must be taken to ensure any actions taken can be achieved in a way that is less restrictive of the person's rights and freedom of action.

Independent Mental Capacity Advocate (IMCA)

In some cases, patients may be referred for an IMCA. IMCAs are legal safeguards for people who lack the capacity to make specific important decisions: including decisions about where they live and serious medical treatment options. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.

Deprivation of Liberty Safeguards (DoLS)

The DoLS provides protection for people who are in hospitals or care homes in circumstances that amount to a deprivation of their liberty and who lack the capacity to consent to the care or treatment they need.

These DoLS safeguards have been introduced to ensure that no one is deprived of their liberty in a hospital or care home setting without good reason, and that people who are deprived of their liberty receive the care they need while retaining specific rights.

The majority of people who will require the protection of the DoLS are people with moderate to severe learning disabilities, older people with dementia or people with neurological conditions such as brain injuries.

All councils are now required to carry out DoLS assessments for anyone placed into hospital or residential care who may lack the mental capacity to consent to being there. These DoLS assessments were introduced to safeguard people lacking mental capacity and ensure they are being cared for in a less restrictive and best way possible.

As a family member or friend of the relevant person (this is the person who needs to be assessed under DoLS), you are entitled to be consulted about their care.

Understanding DoLS

Firstly, if your family member or friend is being considered for DoLS, there is no need to be concerned. This process acts as an added safeguard to their care. The purpose of this process is to ensure that if care and treatment whilst in hospital amounts to a deprivation of liberty, it is in their best interests and a less restrictive option.

Why were the DoLS introduced?

The DoLS were introduced following the legal judgement given by the European Court of Human Rights about an autistic man with a learning disability, who lacked the capacity to decide whether he should be admitted to hospital for treatment. He was admitted to hospital on an informal basis, but was then prevented from leaving the hospital with his carers. His carers challenged the hospital and took the case to the court, who found that he had been deprived of his liberty unlawfully, which is a breach of the European Convention on Human Rights.

To prevent further breaches of the Convention, and to provide legal protection for vulnerable people who may need to be deprived of their liberty in their best interests in a hospital or

care home, the DoLS were introduced in April 2009. They put in place rules about when a person can be deprived of their liberty and what rights they have if they are deprived of their liberty.

Important terms

There is no simple definition of **deprivation of liberty**. It will depend on the circumstances of each individual case. However, following a ruling by the Supreme Court in March 2014 (The Cheshire West case) far more people than before are now subject to deprivation of liberty safeguards. The Supreme Court also confirmed the use of an ‘acid test’ to help determine whether or not someone is entitled to the deprivation of liberty safeguards. The two key parts of this test are:

- Whether the person is or is not free to leave **and**;
- Is the person under continuous supervision and control?

The **capacity to consent** refers to a person’s mental capacity to agree to a treatment. Under the Mental Capacity Act 2005, a person is said to lack capacity if they are unable to understand and make a particular decision at the time it needs to be made. There are lots of reasons why a person might lack capacity. Some are short-term (for example, they are unconscious) while others are long-term (for example, they have a complex learning disability).

For more information on mental capacity, read about the Mental Capacity Act on the Social Care Institute for Excellence website at www.scie.org.uk/mca

When can someone be deprived of their liberty?

The DoLS sets out clear guidelines on when someone can be lawfully deprived of their liberty.

1. It must be to provide a specific treatment or care plan that is in the person’s best interests.

2. Doctors or care professionals must be satisfied that there is no suitable alternative care plan that would not deprive the person of their liberty.
3. The managing authority (the hospital or care home where the person is staying) must apply to its supervisory body (the local authority) for authorisation of the deprivation of liberty of the relevant person.
4. The supervisory body must conduct six assessments to confirm that the deprivation of liberty is lawful and appropriate:
 - **Age assessment:** to check whether the person is aged 18 or over.
 - **No refusals assessment:** to ensure that the proposed treatment does not conflict with a valid decision already made by an attorney or deputy on the person's behalf, or with a decision made in advance by the relevant person themselves.
 - **Mental capacity assessment:** to confirm whether the person being deprived of liberty lacks capacity to consent to the arrangements made for their care and treatment.
 - **Mental health assessment:** to check whether the person being deprived of liberty is suffering from a disorder within the meaning of the Mental Health Act 1983. If they are, different rules may apply.
 - **Eligibility assessment:** to confirm whether the person is eligible to be deprived of liberty under the DoLS.
 - **Best interests assessment:** firstly to establish whether the proposed care plan does deprive the person of their liberty, and secondly to confirm whether it is:
 - in the best interests of the person to be subject to the authorisation

- necessary in order to prevent them from coming to harm
- a proportionate response to the likelihood of them suffering harm and the seriousness of that harm.

If the answer is **yes** to all six assessments, then an authorisation will be granted by the council.

Urgent authorisations

In some cases, the hospital may think it is necessary to deprive someone of their liberty immediately – for example, if the person’s circumstances change and particular **treatment is needed urgently**.

In this situation the hospital can issue itself an urgent authorisation. The hospital must apply for a standard authorisation at the same time and the assessments must be completed within seven calendar days.

What happens once a DoLS authorisation is granted?

The supervisory body will set how long the authorisation will last, based on the person’s individual circumstances. This can be for any period up to a maximum of 12 months. While the authorisation lasts, if at any point the person is no longer deprived of their liberty or their circumstances change, then the authorisation will be reviewed and, where appropriate, end.

There are several points in the process where, as a friend or family member, you can have a say. At some points, you should be consulted. At other points, you should be informed. This section explains more about your rights.

When should a friend or family member be consulted?

Friends or family members previously named by the relevant person (or someone acting on the relevant person's behalf) should be consulted at the following points:

- **Before a managing authority applies for an authorisation** – the managing authority should discuss the proposed care plan with any named friends or family members, to see if they agree that it is appropriate and that the deprivation of liberty would be necessary. This is essential for a standard authorisation, and where possible it should happen before an urgent authorisation is made.
- **At the time of the best interest assessment** – the person carrying out this assessment should ask any named friends or family members whether they agree that the proposed treatment or care plan is in the relevant person's best interests.
- **If anyone challenges the authorisation or care plan after it has begun** – if someone (such as another friend or family member, or someone appointed to represent the relevant person) challenges the authorisation, because they think it is no longer necessary or for any other reason, named friends or family members may be asked for their views.

When should a friend or family member be informed?

Every named friend or family member should be kept informed about the relevant person's treatment. In particular, you should be informed in writing:

- When the assessments have been completed, to let you know whether the authorisation has been issued or not
- When the authorisation comes to an end
- If the managing authority requests a new authorisation after any reviews or challenges to the care plan.

What can you do to support your friend or family member?

If your friend or family member is subject to the DoLS process, the ward or member of their medical or nursing team will have spoken about this process with you. You may want to inform your friend or family member what it means or reassure them if they are worried.

As part of the assessment the best interest assessor or s.12 doctor (a doctor approved to carry out these assessments) may contact you and ask you things such as what the patient was like prior to losing capacity – if you are unsure, speak to someone else that knows them.

You may also want to find out more about DoLS. Here are some useful resources to look at:

Age UK

www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs62_deprivation_of_liberty_safeguards_fcs.pdf

Mind (the mental health charity)

www.mind.org.uk/information-support/legal-rights/mental-capacity-act-2005/deprivation-of-liberty/#seven

Acting as a relevant person's representative

Everyone who is deprived of their liberty under the DoLS is entitled to a relevant person's representative (RPR). This is normally a friend or family member, who should be consulted and informed about all matters relating to the care or treatment of the relevant person while the authorisation lasts.

The RPR is also able to make decisions on behalf of their friend or family member, and has legal rights to:

- Challenge or request a review of the authorisation at any time

- Ask for an Independent Mental Capacity Advocate (IMCA) to be appointed, to provide extra support to the relevant person and their representative if they do not already have a professional representative.

The RPR should be appointed as soon as possible after a standard deprivation of liberty authorisation is given. To ensure that this is the case, the person carrying out the best interests assessment is asked to recommend someone to act as the RPR.

As a friend or family member, you may be asked if you would be willing to act as the RPR. If so, you should decide if:

- You are willing to do so
- You are able to keep in regular contact with the relevant person during the authorisation period
- You are confident that you can act in their best interests and you can support a right to appeal if the patient wishes to do so.

For a more detailed explanation of the roles, responsibilities and rights of an RPR, please read ‘What is a Relevant Person’s Representative (RPR)?’.

www.mental-capacity.co.uk/relevant-persons-representative-rpr/

Contacting your friend or family member

If your friend or family member is being deprived of their liberty, you should still be able to keep in contact with them. The hospital or care home should make sure this is possible.

Challenging an unlawful deprivation of liberty

If you believe that your friend or family member is being deprived of their liberty unlawfully (that is, without the appropriate authorisation in place), you must inform the hospital immediately.

In the first instance, you should ask the hospital to apply for an authorisation if it wants to continue with the care regime, or to change the care regime immediately.

Given the seriousness of deprivation of liberty, the hospital must respond to you quickly – normally within 24 hours. If you do not get a response, you should contact the local DoLS office (council) where the patient lives – normally the local council.

Asking for an authorisation to be reviewed

If you think that an authorisation is no longer necessary, you can ask for it to be reviewed. Normally, you should do this through the relevant person's representative or by contacting the hospital.

If a person dies

If a person dies and has a DoLS authorisation at the time of their death, the coroner only needs to be notified if:

- The cause of death is unknown, or
- The cause of death is unnatural, or
- There were concerns on the treatment of the deceased prior to death.

It is recognised that this may cause an amount of uncertainty to friends and family. The aim of this process is not to cause any distress and is usually a straightforward exercise to ensure that the patient's passing was not in any way resulting from the DoLS.

FAQs

Is this the same as being sectioned?

No, it is not the same as being detained under the Mental Health Act 1983. You do not need to have treatment for a mental health problem in order to be deprived of your liberty.

You can be deprived of your liberty to keep you safe, or for treatment of health problems. If you need to be detained mainly for treatment for a mental health problem, this will normally be done under the Mental Health Act 1983. If you are already detained under the Mental Health Act, the health professionals cannot apply the deprivation of liberty procedure under the Mental Capacity Act 2005 at the same time.

If I agree to be an RPR, does that mean I have to go to court?

Usually no, but when you agree to act as an RPR you have to be mindful of your role and responsibilities which may mean supporting the patient to challenge the DoLS or challenge the DoLS yourself.

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 (hospital) and supervising authority (council/local DoLS office), either by asking for an assessment to be carried out or for a review of an existing authorisation. This may be in the form of a formal complaint.

However, due to the serious nature of depriving someone of their liberty, you should not delay involving the Court if a managing authority or supervisory body is not dealing with a request to assess or review as a matter of urgency. The following people can bring a case to the Court of Protection:

- The person who is being deprived of liberty, or at risk of deprivation
- An attorney under a Lasting Power of Attorney
- A deputy

- A person named in an existing Court Order related to the application
- The RPR.

Other people, such as an IMCA or any other third party, can apply to the Court for permission to take a case relating to the deprivation of liberty.

Is there a cost involved?

Yes, a cost is incurred if a DoLS is challenged at court, but this is absorbed by the state and an individual person will not be expected to pay legal fees.

I'm not sure this process is right for my friend or family member, what do I need to do?

Firstly you can discuss this with the appointed best interest assessor who needs to take your views on board. It may be that after a thorough discussion you may change your view or may have even stronger views to oppose the process.

You can challenge the DoLS by writing to the local DoLS team or challenge it through the Court of Protection. In order to do this, we advise that you make contact with your local IMCA service as they can support you and provide further advice.

Supportive and protective actions relating to MCA and DoLS

Lasting Power of Attorney (LPA)

A Lasting Power of Attorney (LPA) is a legal document that lets you (the donor) appoint one or more people (known as attorneys) to help you make decisions or to make decisions on your behalf. This gives you more control over what happens to you if, for example, you have an accident or an illness and cannot make decisions at the time they need to be made (you lack mental capacity).

Court Appointed Deputy

Described by the MCA Code of Practice as ‘someone appointed by the Court of Protection with ongoing legal authority as prescribed by the Court to make decisions on behalf of a person who lacks capacity to make particular decisions as set out in Section 16(2) of the Act’ MCA Code of Practice (2007). A Court Appointed Deputy has a similar function to an LPA. Applications can be made to the Court of Protection if the person whom the application relates to is unable to appoint LPA as they lack mental capacity.

Advance Decisions

Advance decisions, which may be referred to as a living will, inform professionals and others, including family members, of a person’s wishes about their health and care, should a person not have the mental capacity or ability to communicate their decisions at the time required. Writing an advance decision can provide reassurance in case a time comes when a person cannot make choices and decisions, and enables others to know what the person’s wishes and choices are.

A number of guides are available to support people drawing up advance decisions. The following links provide additional information and guidance on advance decisions.

NHS Guide to Advance Decisions

www.nhs.uk/conditions/end-of-life-care/advance-decision-to-refuse-treatment/

Age UK Guide to Advance Decisions

www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs72_advance_decisions_advance_statements_and_living_wills_fcs.pdf

Alzheimers Society Guide to Advance Decisions

www.alzheimers.org.uk/get-support/legal-financial/how-to-make-advance-decision

The Royal Marsden Macmillan Hotline: 020 8915 6899

You can ring the hotline 24 hours a day, 7 days a week.

Call us straight away if you are feeling unwell or are worried about the side effects of cancer treatments.

This service provides specialist advice and support to all Royal Marsden patients, as well as to their carers, and both hospital and community-based doctors and nurses caring for Royal Marsden patients.

Further support

The Patient Advice and Liaison Service (PALS)

With Help Centres at both Sutton and Chelsea, the PALS team are available to speak to in confidence, signpost you to further information and provide support.

Chelsea 020 7811 8438 / 020 7808 2083

Sutton 020 8661 3759 / 3951

Email patientcentre@rmh.nhs.uk

References

This booklet is evidence based wherever the appropriate evidence is available, and represents an accumulation of expert opinion and professional interpretation.

Details of the references used in writing this booklet are available on request from:

The Royal Marsden Help Centre

Telephone: Chelsea 020 7811 8438 / 020 7808 2083

Sutton 020 8661 3759 / 3951

Email: patientcentre@rmh.nhs.uk

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Should you require information in an alternative format, please contact The Royal Marsden Help Centre.

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