

A new system of registration

The Mental Capacity Act 2005 deprivation of liberty safeguards

Guidance for providers

October 2010

Introduction

This guidance tells you about the Mental Capacity Act 2005 deprivation of liberty safeguards, and explains:

- How the safeguards relate to the Health and Social Care Act 2008.
- How you can apply for authorisation to deprive a person of their liberty when it is in their best interests to do so.
- What we will look for when monitoring practice in care homes and hospitals.

Outcomes for people

When your service meets the Mental Capacity Act deprivation of liberty safeguards, the people who use your care and treatment services and their supporters are confident that:

- You and your staff are aware of your duties and responsibilities under the deprivation of liberty safeguards.
- Their human rights are respected and their liberty is only deprived when:
 - It is in their best interests, and
 - There are no other less restrictive ways of keeping them safe and well and giving them the care and/or treatment they need.

You should be aware of the duties and responsibilities placed on you by the deprivation of liberty safeguards, and be able to judge whether you are meeting them.

Legal framework

1. The deprivation of liberty safeguards came into force when the Mental Capacity Act was fully implemented on 1 April 2009.
2. Everyone working in health and social care who makes decisions for people who lack capacity has a duty to know about and follow the Act's codes of practice. There is a general code of practice covering decision-making, and a supplementary code of practice on the deprivation of liberty safeguards. They describe the responsibilities of 'assessors' of capacity, 'decision-makers', independent supporters, care homes, hospitals and CQC in relation to depriving people of their liberty.
3. The Act has five key principles that apply equally to practice under the deprivation of liberty safeguards:
 - **We must begin by assuming that people have capacity**
"A person must be assumed to have capacity unless it is established that he/she lacks capacity."

- **People must be helped to make decisions**
“A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success”
 - **Unwise decisions do not necessarily mean lack of capacity**
“A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.”
 - **Decisions must be taken in the person’s best interests**
“An act done, or decision made under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests.”
 - **Decisions must be the least restrictive of freedom as is possible**
“Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”
4. Only providers and managers registered in respect of regulated activity in hospitals and care homes can apply to deprive a person of their liberty under the Mental Capacity Act deprivation of liberty safeguards. Providers and managers of other services cannot apply for authorisation to deprive a person of their liberty under the safeguards.
 5. This guidance explains which services are covered by the legal definition of ‘care home’ and ‘hospital’ in relation to the Act.
 6. Local councils with social services responsibilities and NHS primary care trusts that receive, assess and decide on applications to deprive a person of their liberty are referred to by law as ‘supervisory bodies’. The providers and managers who are registered for regulated activities in care homes and hospitals are called ‘managing authorities’.
 7. Local councils and PCTs have a lead role in implementing the Act across health and social care. You should contact them to find out more about the Act and the deprivation of liberty safeguards.
 8. The Health and Social Care Act 2008 has replaced the Care Standards Act 2000 for most health and social care regulation purposes. Although providers now register to carry on ‘regulated activities’ rather than establishments and agencies, the terms ‘care home’ and ‘hospital’ continue to apply and be used with regard to the Mental Capacity Act (please see our website for more information).

Guidance

1

In what circumstances can the Mental Capacity Act be used to deprive a person of their liberty?

You should not make an application to deprive someone of their liberty simply because a person lacks the capacity to decide whether they should be in a care home or hospital.

Providers and managers registered for regulated activities in care homes and hospitals (called managing authorities) should consider whether the decisions they have made, or will be making, amount to depriving someone of their liberty **when looked at collectively**. If they do, they must follow the Mental Capacity Act deprivation of liberty safeguards.

People can only be deprived of their liberty under the Mental Capacity Act deprivation of liberty safeguards if:

- Being in a care home or hospital in order to receive care and/or treatment is in their best interests and is absolutely vital to their basic welfare, and
- They are being, or will be, deprived of their liberty while they are there, and
- They do not have the capacity to make a decision about the arrangements being proposed for them to stay in a care home or hospital so that they can receive that care or treatment.

2

Does a deprivation of liberty authorisation under the Act also authorise the care and treatment the person needs?

No. Authorisation to deprive someone of their liberty **does not** include giving care and/or treatment. Any decisions about care and/or treatment have to be made separately under the main code of practice guidelines (see the separate guidance to the Mental Capacity Act on our website).

3

What is the difference between deprivation and restriction of liberty?

Restricting liberty and taking it away are two different things. Managers and staff of care homes and hospitals must understand the difference, and how they are handled under the Act.

The deprivation of liberty safeguards code of practice does not define deprivation of liberty. Some recent cases have involved decisions over what can amount to deprivation of liberty, but these will not necessarily apply to other people in different situations. The code states that: “The difference between deprivation of liberty and restriction upon liberty is one of degree or intensity. It may therefore be helpful to envisage a scale, which moves from ‘restraint’ or ‘restriction’ to ‘deprivation’ of liberty. Where an individual is on the scale will depend on the concrete circumstances of the individual and may change over time.” (Paragraph 2.3).

A decision made about how a person is treated and/or cared for on any one occasion is unlikely to mean that they are being deprived of their liberty. For example, periodically restraining someone in order to give them vital care or treatment does not alone amount to them being deprived of their liberty.

The European Court of Human Rights (ECHR) judgment in *HL v The United Kingdom* (the ‘Bournewood’ case) ruled that when deciding whether a person is being deprived of their liberty “the key factor (is) that the (care service) exercised complete and effective control over his care and movements” and that “the applicant was under continuous supervision and control and was not free to leave”.

In this case, complete and effective control flowed from a range of decisions that included:

- The use of restraint, including sedation, to admit them to the service.
- What medical and personal care they would receive, including assessments and treatment.
- Where they could go.
- Who they could see.

In addition, decisions had been taken which meant that:

- The person could not leave the service, and would be stopped from doing so if they tried.
- They could not live with their family (who had asked for this to happen).

In summary, under existing case law, you should take the following factors into account when deciding whether deprivation of liberty is occurring:

- Whether the person is allowed to leave the care home or hospital.
- Whether the person has few if any choices.
- Whether the person is not allowed to keep in touch with friends or relatives outside the care home or hospital.
- Whether the restrictions are taking place over a long time.

4

Is 'restraint' a deprivation of someone's liberty?

Section 6(4) of the Mental Capacity Act 2005 states that restraint is when force is used (or threatened) to make someone do something they are resisting, and when someone's freedom of movement is restricted, whether or not they are resisting.

Restraint can be appropriate when used from time to time to prevent serious harm to a person who lacks capacity - **if** it is a proportionate response to the likelihood and seriousness of the harm, and all other less restrictive means of achieving this have been tried. Records will need to show this. Appropriate use of restraint in this way is not deprivation of liberty.

If you use restraint frequently and you have made other decisions that significantly restrict a person's liberty, you should consider whether the person's liberty is being deprived. If so, you must apply for authorisation under the deprivation of liberty safeguards **or** change the way you care for the person to reduce the restrictions of liberty. You should always make these decisions in consultation with professionals, members of the person's family, and relevant representatives and advocates.

5

How do care homes and hospitals apply to deprive someone of their liberty?

The deprivation of liberty safeguards require providers registered for regulated activities in relation to hospitals and care homes ('managing authorities') to apply to local social services or NHS primary care trusts ('supervisory bodies') to deprive an adult without capacity of their liberty. If the authorisation is given, the deprivation of liberty will only be allowed to take place under very strict and time-limited conditions that must be reviewed continuously.

Decisions on deprivation of liberty can only be made after some important questions (the six assessments) have been satisfactorily answered:

- **Is the person old enough (they must be at least 18)?**
- **Do they have a mental disorder (as defined by the Mental Health Act 1983)?**
- **Do they lack capacity to decide about the arrangements being proposed?**
- **Are they already subject to a Mental Health Act 'section' – or should they be?**
- **Did they refuse the proposed arrangements when they had capacity, or has any attorney or deputy involved in their care**

made a valid decision to refuse the proposed arrangements?

- **Is the deprivation of liberty in their best interests?**

In emergencies, people registered to run or manage care homes and hospitals can authorise themselves to deprive someone of their liberty, but these self-authorisations only last for one week and can only be extended once, under very special circumstances. The managing authority must also apply to a supervisory body for authorisation under normal procedures at the same time that they grant themselves an urgent self-authorisation.

The deprivation of liberty safeguards include the following important provisions:

- Independent Mental Capacity Advocates (IMCAs) must be involved in all assessments of whether to deprive someone of their liberty if the person only has the support of paid carers.
- A 'Relevant Person's Representative' (RPR) is appointed to support the person in question.
- Both the person in question and their representative have the right to appeal to the Court of Protection against a decision to deprive them of their liberty.
- The person or their representative can apply to the Court of Protection to change any conditions imposed as part of the deprivation of their liberty, for example which care home or hospital they will be placed in.
- The five principles of the Act must be followed when decisions are made (see page 2).
- Advance decisions must be respected.
- Professionals involved are **personally** liable for their decisions.

You must ensure that your staff are familiar with, and understand, the deprivation of liberty safeguards.

We can confirm that services and supervisory authorities are following the deprivation of liberty safeguards by checking:

- Whether staff are aware of the safeguards and when they should be used.
- Whether managing authorities:
 - Have appropriate policies and procedures.
 - Apply for authorisations when needed.
 - Have copies of application forms and decisions.
 - Have records that can show that the authorisation and any conditions are being properly followed.
- Whether supervisory bodies:
 - Have appropriate policies, procedures and arrangements for receiving applications, requests for reviews, and third party referrals.

- Have processes and arrangements that ensure the six assessments can take place by suitably trained assessors before an authorisation is given.
- Have ensured that suitably trained IMCAs are available.

6

What protection does the Mental Capacity Act give to care services and workers who deprive people of their liberty?

The Act protects care and treatment services and their workers from legal action arising from actions they may take to deprive people of their liberty, as long as they have followed the deprivation of liberty safeguards.

This includes:

- Meeting the principles of the Act.
- Working under a proper assessment of capacity and reasonably believing that the person cannot make decisions about relevant aspects of their care or treatment.
- Believing that what they are doing is in the person's best interests.
- Making sure that restrictions of freedom are reasonable and proportionate.
- Applying for authorisations to deprive people of their liberty and providing all the required information.
- Following any conditions included in an authorisation.

However, the Act does not offer protection if a worker or carer has been negligent in the way they carry out an action.

7

How will CQC monitor people's experiences of the deprivation of liberty safeguards?

Although we are responsible, under the Mental Capacity Act, for monitoring the activity under the deprivation of liberty safeguards, we have no powers to enforce compliance with them. However, our powers under the Health and Social Care Act include enforcing important requirements that ensure people's rights are respected and that their needs are properly assessed, thoroughly planned for, and regularly reviewed. Where this is not being done, we will follow the processes described in our enforcement policy to ensure that providers are complying with the law. To do this, we will:

- Identify people who have been subject to deprivation of liberty applications and explore the experiences of some of those people. We will do this by:
 - Checking the number of notifications providers have submitted about applications to deprive people of their liberty, and the outcomes of those applications.
 - When we carry out a review of compliance, including those who have been subject to deprivation of liberty applications and authorisations in the sample of people whom we want to interview.
- Look at documents and records of applications and authorisations. These include:
 - Completed forms
 - Notices
 - Any conditions imposed
 - Any requests for review
 - Evidence of regular monitoring
 - Plans of care, treatment and support
 - Other relevant documents.
- Check that the provider has recorded the steps taken to involve and inform the person, their family, friends and supporters.
- Include Relevant Person's Representatives (RPRs), Independent Mental Capacity Advocates (IMCAs), Lasting Power of Attorneys (LPAs) or court deputies in survey samples.
- Check that the managing authority is keeping regular contact with the RPR.
- Check that records show that it has been explained to the relevant person that they can appeal to the Court of Protection.
- Check that the two-stage test of capacity has been undertaken and recorded whenever needed in our sample.
- Check that assessments and care planning records are consistent with the Act's code of practice guidelines (see our separate guidance on the Mental Capacity Act).
- Make sure that the managing authority has appointed someone to check that protocols and procedures are being followed.
- Sample the work of supervisory bodies during assessments of council social services departments and NHS bodies.
- Gather statistical information from councils and PCTs about deprivation of liberty safeguards activity, and make judgments about what it tells us.

- Describe people’s experiences in our inspection reports about hospitals and care homes and include information on deprivation of liberty safeguards activity in our national reports.

8

How will CQC check that a provider and its staff know about the Mental Capacity Act deprivation of liberty safeguards?

We will:

- Look at your protocols and procedures on deprivation of liberty.
- Check that copies of the deprivation of liberty code of practice are available to relevant staff.
- Check that the induction and training for your staff includes learning how the Mental Capacity Act deprivation of liberty safeguards affects their work.
- Ask staff about their understanding of the Mental Capacity Act 2005 and the deprivation of liberty safeguards, and how this affects the people using the service.
- Look to see if your admission processes include:
 - Asking about and recording whether someone has made an advance decision on receiving medical treatment.
 - Recording a person's Lasting Power of Attorney (LPA), Independent Mental Capacity Advocate (IMCA), court deputy, or Relevant Persons Representative (RPR).
- Check that staff are aware of any person who is subject to a deprivation of liberty authorisation, and that they know about and understand their plan of care, treatment or support.
- Observe life in your service and make further enquiries about staff awareness of decision-making requirements where we consider that restrictions of liberty may together amount to deprivation of liberty.
- Take into account good practice involving dementia, learning disability, and mental health.

9

What will CQC do if it suspects someone is being unlawfully deprived of their liberty?

We will bring this to your attention and ask you to apply for an authorisation if you want to continue to deprive the person of their liberty. The deprivation of liberty code of practice says that the provider must tell us what they are going to do about our request within a

reasonable time (normally 24 hours).

If you do not apply for an authorisation within a reasonable time, we ask the relevant local authority or PCT (supervisory body) to decide if an unauthorised deprivation of liberty is taking place.

We will tell the supervisory body the name of the person we are concerned about and the name of the service. We will tell them why we think the person is being deprived of their liberty.

Supervisory bodies must look into the referral and, if they think the person is being deprived of their liberty, they must begin a full assessment and make a decision as though an application had been made.

We may make a safeguarding alert and/or consider taking relevant action under our enforcement policy if you fail to comply with the deprivation of liberty safeguards, for example if you are using inappropriate restraint.

10

How will CQC report on activity under the deprivation of liberty safeguards?

We will report at a national level in our annual report to Parliament. We will also report practice in individual hospitals and care homes in the 'consent to care and treatment' section in the report of a review of compliance (outcome 2).

The report will detail:

- Whether there are any people using the service subject to authorised deprivation of liberty and, if so, whether the deprivation of liberty safeguards and authorisation conditions are being met.
- Whether anyone using the service is being deprived of their liberty without an authorisation and, if so, what the provider has done to make sure that they will comply with the law.

Reports will describe individual people's experiences of the authorisation, the care they receive under it, and any requirements and recommendations that we made.

We do not have duty or powers to enforce the Mental Capacity Act, but we can set improvement actions and compliance actions under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010. For example:

- If people are not being involved in decisions about their care, under regulation 17 (outcome 19 of the essential standards).
- If there are concerns about the arrangements for people who lack capacity to help them to consent to care and treatment, under regulation 18 (outcome 20).

We can also set improvement actions and compliance actions about relevant aspects of people's care. For example:

- If assessments of capacity and decision-making are not being undertaken in a way that complies with the codes of practice, we can consider whether regulation 9 (outcome 4 of the essential standards) is being met.
- If we have concerns about the use of restraint and people's capacity to consent, we can consider whether regulation 11 (outcome 7) is being met.

Mental health hospitals and units

Our Mental Health Act Commissioners will include concerns relating to any Mental Capacity Act deprivation of liberty safeguards in:

- Feedback summaries following visits to mental health service providers.
- Annual statements for providers where deprivation of liberty safeguards issues have not been satisfactorily addressed.

Commissioners will also include descriptions of good practice where they see them.

11

As services no longer register as 'care homes' or 'hospitals' under the Health and Social Care Act, which services do the safeguards apply to?

Although service providers now register to carry on 'regulated activities', the terms 'care home' and 'hospital' continue to apply and be used for Mental Capacity Act purposes.

Care homes

The definition of a care home in the Care Standards Act 2000 still applies for Mental Capacity Act purposes. The Care Standards Act says that an establishment is a care home if it provides accommodation, together with nursing or personal care, for people who:

- a) Are or have been ill.
- b) Have or have had a mental disorder.
- c) Are disabled or infirm.
- d) Are or have been dependent on alcohol or drugs.

However, in relation to care homes, only a person registered to carry on or manage the regulated activity 'accommodation for persons who require nursing or personal care' can act as a 'managing authority' for deprivation of liberty safeguards purposes.

Hospitals

The National Health Service Act 2006 defines a hospital as:

- a) Any institution for the reception and treatment of persons suffering from illness,
- b) Any maternity home, and
- c) Any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution.

Providers who are carrying on or managing regulated activity at locations meeting the definitions above must comply with the Mental Capacity Act 2005 deprivation of liberty safeguards and code of practice.

Providers and managers of services at locations that do not meet these definitions cannot deprive a person of their liberty under the deprivation of liberty safeguards. They will need to consider making an application to the Court of Protection.

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Links to more information about the Mental Capacity Act

Ministry of Justice: for copies of the codes of practice, leaflets and guidance on the Mental Capacity Act:

<http://www.justice.gov.uk/guidance/mental-capacity.htm>

Department of Health: further information on the Mental Capacity Act deprivation of liberty safeguards, and links to authorisation forms and other documents:

www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm

Information on the end of life care strategy:

<http://www.dh.gov.uk/en/Policyandguidance/Organisationpolicy/Endoflifecare/index.htm>

Office of the Public Guardian: links to information on the Act and Codes of Practice, and easy read guidance:

<http://www.publicguardian.gov.uk/>

Care Quality Commission: see the registration pages on our website

<http://www.cqc.org.uk/guidanceforprofessionals.cfm>