

Everything you need to know about deprivation of liberty safeguards

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Abstract

Established as an amendment to the Mental Capacity Act 2005, the deprivation of liberty safeguards were introduced to ensure that anyone who lacks capacity to consent to their care, and was being deprived of their liberty, has rights equivalent to those held under the Mental Health Act 1983. These rights include someone to oversee any deprivation of liberty, the right of appeal and the guarantee of review of appeal in a timely manner. This article outlines how deprivation of liberty safeguards work, how a deprivation of liberty safeguards is applied for and obtained, what to discuss with the next of kin, and some special circumstances to consider. It also provides information about the criteria by which deprivation of liberty safeguards applications are assessed and the process by which this is done. This provides an overview for junior doctors working in secondary care, to increase their knowledge and confidence when patients require a deprivation of liberty safeguards application.

Key words: Deprivation of liberty; Deprivation of liberty safeguards; DoLS; Mental Capacity Act

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What is deprivation of liberty safeguards?

Deprivation of liberty safeguards is an amendment to the Mental Capacity Act 2005 made following a court ruling (**Figure 1**), 'a set of checks that aims to make sure that any care that restricts a person's liberty is both appropriate and in their best interests' (Alzheimer's Society, 2019). It provides the person with someone to represent their interests, a right to challenge the ruling and a guarantee that someone is overseeing and reviewing the deprivation of their liberty. A person is considered to be deprived of their liberty if all three criteria below are met (United Kingdom Supreme Court, 2014; Department of Health, 2015a):

1. If a person lacks the capacity to consent to care or treatment arrangements
2. If they are under constant supervision and control
3. If they are not free to leave.

- Deprivation of liberty safeguards was introduced in 2007, and enacted in 2009, following a case in the European Court of Human Rights known as the Bournemouth case.
- A patient with learning disabilities was admitted to Bournemouth Hospital for 3 months and his carers were denied access to him in case he would want to go home with them. He lacked capacity to decide about admission and treatment.
- There was a plan to section him under the Mental Health Act 1983 should he try to leave but as he never made this attempt he remained an informal patient.
- The carers took the case to court claiming a breach of his human rights and the court found that this constituted a deprivation of his liberty contrary to Article 5 of the European Convention on Human Rights. It was noted that he did not have the same protections and rights of appeal as those detained under the Mental Health Act.
- Deprivation of liberty safeguards was created to provide legal protection and an appeals process for patients who lack capacity to consent to treatment or care.

Figure 1. History of deprivation of liberty safeguards: the Bournemouth case (Select Committee on the Mental Capacity Act 2005, 2014)

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These criteria are referred to as the ‘acid test’ and were established following a Supreme Court ruling in 2014. In this case, *P vs Cheshire West*, P was a man who had cerebral palsy and Down’s syndrome and lacked capacity to make decisions about his care. He was in local authority accommodation with 1:1 carers because of his challenging behaviour. The initial Court of Protection ruled he was being deprived of his liberty, but that it was in his best interest. The Court of Appeal disagreed, reasoning that in comparison with another person of his age and disabilities this was not a deprivation of liberty.

The final judgment of the Supreme Court overturned this and decided that the test of whether someone is being deprived of their liberty should not be made in comparison with anyone else, but with the criteria as set out above (United Kingdom Supreme Court, 2014). They stated that someone who lacked capacity could be justifiably deprived of their liberty in their own best interest, but that ‘a gilded cage is still a cage’ (United Kingdom Supreme Court, 2014).

How are deprivation of liberty safeguards obtained?

A deprivation of liberty safeguards application is made by the managing authority for anyone who would qualify within their care. In the hospital setting the initial forms are often completed by a doctor, senior nurse or ward manager. The deprivation of liberty safeguards forms that are filled out on the wards are the request for an assessment regarding whether this person can be deprived of their liberty. This assessment is then carried out by local authority representatives (or local health board representatives for hospital patients in Wales), a mental health assessor and a best interests assessor.

A deprivation of liberty safeguards can be applied for using an urgent or a standard authorisation form. In an emergency, a hospital can grant themselves an urgent authorisation, which remains valid for 7 days. It should be noted that a standard authorisation must be applied for at the same time (Currie, 2015).

After the three criteria above have been met and it has been decided that deprivation of liberty may be occurring, in order to issue a deprivation of liberty safeguards the local authority must establish the presence and absence of several other criteria (Table 1). If the local authority then feels that deprivation of liberty safeguards are warranted this will be issued. Standard assessments must be completed within 21 days of the application and remain valid for up to 12 months before the application must be made again (Ministry of Justice, 2008).

A ‘relevant person’s representative’ is then appointed – usually a relative or friend. This person has the legal authority to represent the individual under a deprivation of liberty safeguards. They should be in close contact with the person who is under a deprivation of liberty safeguards. They have access to documents about the decision and can appeal the deprivation of liberty safeguards authorisation (and they should if the person being put under a deprivation of liberty safeguards disagrees with it). They can also ask for a review if the care arrangements change (Alzheimer’s Society, 2019).

Table 1. Criteria for deprivation of liberty safeguards application

Person is aged ≥ 18 years
Has a mental disorder
Lacks capacity to make decisions about treatment and care
Depriving them of their liberty is in their best interests, will keep them safe from harm, is a reasonable response and the least restrictive option
The person is not being held under the Mental Health Act
Not in conflict with an advanced directive
If they exist, a lasting power of attorney or court appointed deputy, are in agreement

From Social Care Institute for Excellence (2017)

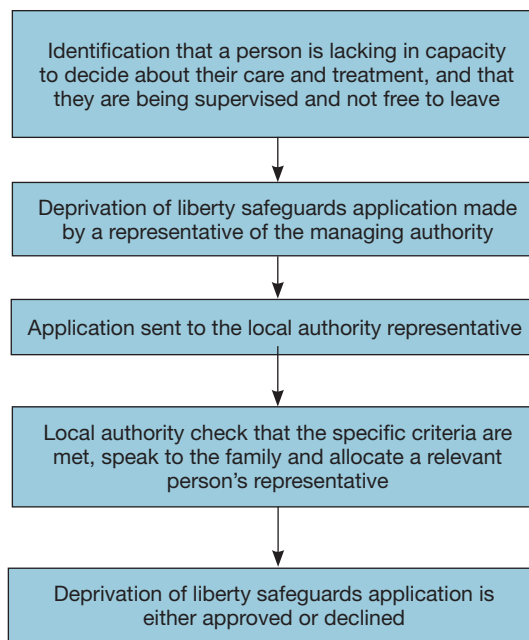


Figure 2. Application process for deprivation of liberty safeguards

If there is no one suitable then an independent representative should be allocated, such as an independent mental capacity advocate, by the court of protection. An independent mental capacity advocate is an outside person or someone who is knowledgeable about a person's rights, the law and the health and social care system who can support a person in expressing their views or represent their interests when a difficult decision needs to be made (Lee, 2017). They have the right to access documents about decisions being made regarding deprivation of liberty, and to ask for a review of any decisions especially if the arrangements of care change. Importantly, even if the representative agrees with the deprivation of liberty safeguards put in place, if the person subject to the deprivation of liberty safeguards disagree they then they have the right to appeal the decision (Alzheimer's Society, 2019). Deprivation of liberty safeguards must be revoked if no longer required within the 12-month period, and a new application made if a deprivation of liberty safeguards assessment is required again in future. The application process for deprivation of liberty safeguards is summarised in [Figure 2](#).

Who does deprivation of liberty safeguards apply to?

Deprivation of liberty safeguards is specific to patients currently in a care home or hospital, and only applies to those residing in England or Wales. Scotland has a different system called The Adults with Incapacity (Scotland) Act 2000.

Deprivation of liberty safeguards applies to any patient lacking capacity to decide about care and treatment, where staff are deciding what their routine will be, if they are being supervised and monitored, or if they are not free to leave the premises. This applies even if the person is compliant and not objecting to the situation. If someone is deemed to be being deprived of their liberty, the initial emphasis should always be on trying to find the least restrictive way of doing this. In practice this may be challenging and restrictions are often required to care for the person in their best interest. Deprivation of liberty safeguards will sometimes specify what restrictions on a person's liberty can be used, for example whether they have bedrails to prevent them getting out if it is felt to be in their best interest. This can be amended with a review if the person's circumstances change.

The criteria for deprivation of liberty apply to a large portion of the inpatient hospital population, and in response to a Supreme Court judgement in 2014, there was a tenfold increase in deprivation of liberty safeguards applications (Department of Health, 2015a). This meant that local authorities were struggling to process all the extra applications within the legal timescale.

As a consequence of this, the Association of Directors of Adult Social Services have developed a prioritisation tool for requests for deprivation of liberty safeguards assessments (Currie, 2014). This prioritises especially urgent applications, for anyone who is being physically restrained, sedated, or having 1:1 supervision. It also includes anyone trying to leave the premises, or if the patient or family are objecting to the deprivation of their liberty.

When someone has a mental health disorder and needs assessment and treatment in hospital, but also lacks capacity to consent to this, and is likely to be deprived of their liberty, then in theory both detention under the Mental Health Act and a deprivation of liberty safeguards would be available to use. The decision of which to use is made on a case-by-case basis. If one option is less restrictive, it should be weighed against the potential benefits of the other (Department of Health, 2015b).

What should you tell families about the deprivation of liberty safeguards application?

Part of the deprivation of liberty safeguards application process is discussion with the family or next of kin. The doctor needs to explain that a capacity assessment has been performed and has found that their relative is unable to consent to their treatment currently, clinicians will be monitoring them to keep them safe, and will not be allowing them to leave the hospital in their own best interest. As a consequence of this they are being deprived of their liberty and an application for an assessment of the suitability of this has been made to the local authority. The local authority will do an independent assessment and will be in touch with the family to determine what is in the best interest of the person. They have the right to appeal this decision and act as an advocate for their relative in this situation.

Specific circumstances

For patients having palliative care, where they have had capacity to consent to the place and arrangements for end of life care, but then subsequently lose capacity, consent is considered to cover the period until death (Department of Health, 2015a). The caveat to this is if the circumstances of their care should significantly change and more restrictions are put in place after they lose capacity, in which case a deprivation of liberty safeguards application may need to be made.

When patients are admitted in an emergency, such as into the emergency department, it may be unclear initially whether a deprivation of liberty safeguards is appropriate. The Department of Health recognised this in their review of the Supreme Court judgement. They state that a deprivation of liberty safeguards only applies to the emergency department if the person is being restricted to that place for a 'non-negligible period of time' – although it does not specify what this period of time is. If the person lacks capacity, care should not be delayed in an emergency (Department of Health, 2015a).

Does a coroners' referral need to be made if a person dies while subject to deprivation of liberty safeguards?

When deprivation of liberty safeguards was first introduced, a referral to the coroner was needed if the person died because they were regarded as 'in state detention'. This was changed in April 2017. Being under a deprivation of liberty safeguards no longer means an automatic referral to the coroner is needed (Lucraft, 2017). However, if there are other factors which lead you to believe that a death should be referred, then it is still vital to do so.

The future

In July 2018 a Mental Capacity Act (Amendment) Bill was published outlining changes to the current deprivation of liberty safeguards system. This is due to be replaced by liberty protection safeguards with a planned implementation in 2020. Liberty protection

safeguards are likely to build on the deprivation of liberty safeguards framework but include individuals aged 16 years and older, increase the ability to treat people urgently without liberty protection safeguards in place, and more accurately define deprivation of liberty. Liberty protection safeguards are likely to be initially valid for 1 year but up to 3 years on subsequent renewal (Social Care Institute for Excellence, 2019).

Conclusions

Deprivation of liberty safeguards is a protective mechanism for people who are being detained under the Mental Capacity Act. It provides a review of the measures being taken to ensure that the least restrictive methods are being used, and to provide someone to advocate for the person, and a mechanism to appeal the detention.

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Key points

- Deprivation of liberty safeguards forms are a request for an independent assessment to clarify whether depriving someone of their liberty is in their best interest and appropriate to the situation.
- They can be completed by an approved nominee (usually a doctor or nurse) of a managing body – check local policy.
- Emergency authorisation to deprive someone of their liberty can be granted for 7 days by the managing body but a standard request is done at the same time.
- A representative for the person will be assigned – usually a friend, relative or carer, who oversees the process and can appeal the decision, they can also request a review of the deprivation of liberty safeguards if the situation changes.
- Being under a deprivation of liberty safeguards no longer automatically means a referral to the coroner must be made.

Case study

Mary is a 79-year-old woman with Alzheimer's dementia, who usually manages at home with carers and family support. She mobilises independently with a walking stick.

Mary develops a community-acquired pneumonia and delirium, and is admitted to hospital. She is confused and keeps getting out of her chair and trying to walk out of the doors. Staff are concerned that she will wander out of the hospital and could be unsafe on the busy road outside.

Several members of staff have tried to talk to Mary and explained why she needs to stay in hospital, but she does not seem to be taking in any of the information and often walks away during discussion. As a result of this the ward manager has assigned a 1:1 member of staff to stay with Mary and has arranged for her to be moved to a ward that is locked.

The family are very concerned as Mary has never acted like this before. They have never thought about what they would do if Mary's memory worsened and have no plans in place.

Looking at the criteria, is it appropriate to complete a deprivation of liberty safeguards application?

Answer: Mary should have a formal capacity assessment and if she is deemed to not have capacity then an emergency deprivation of liberty safeguards application should be done. She would fulfil the criteria for deprivation of liberty in that she lacks capacity, is under constant supervision (1:1 staffing) and is not free to leave (locked ward).

Curriculum checklist

This article addresses the following requirements from the general internal medicine training curriculum

- Able to deal with ethical and legal issues related to clinical practice
- Providing continuity of care to medical in-patients, including management of comorbidities and cognitive impairment
- Managing end of life and applying palliative care skills

References

- Alzheimer's Society. Deprivation of liberty safeguards. 2019. <https://www.alzheimers.org.uk/get-support/legal-financial/deprivation-liberty-safeguards-dols> (accessed 17 April 2020)
- Currie L. A screening tool to prioritise the allocation of requests to authorise a deprivation of liberty. 2014. <https://www.adass.org.uk/media/5356/adass-priority-tool.docx> (accessed 17 April 2020)
- Currie L. The Mental Capacity Act deprivation of liberty safeguards: guidance to the forms. 2015. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/437661/Final_DoLS_Guidance_2015.pdf (accessed 17 April 2020)
- Department of Health. Department of Health guidance: response to the Supreme Court Judgment/ Deprivation of Liberty Safeguards. 2015a. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/485122/DH_Consolidated_Guidance.pdf (accessed 17 April 2020)
- Department of Health. Mental Health Act 1983 code of practice. 2015b. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice_PDF (accessed 17 April 2020)
- Lee S. Making decisions: The Independent Mental Capacity Advocate (IMCA) Service. 2017. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/365629/making-decisions-opg606-1207.pdf (accessed 17 April 2020)
- Lucraft M. Guidance No 16A Deprivation of Liberty Safeguards (DoLS) – 3rd April 2017 onwards. 2017. <https://www.judiciary.uk/wp-content/uploads/2013/10/guidance-no-16a-deprivation-of-liberty-safeguards-3-april-2017-onwards.pdf> (accessed 17 April 2020)
- Ministry of Justice. Mental Capacity Act 2005 deprivation of liberty safeguards: code of practice to supplement the Main Mental Capacity Act 2005 code of practice. 2008. <https://www.cqc.org.uk/sites/default/files/Deprivation%20of%20liberty%20safeguards%20code%20of%20practice.pdf> (accessed 17 April 2020)
- Social Care Institute for Excellence. Deprivation of Liberty Safeguards (DoLS) at a glance. 2019. <https://www.scie.org.uk/mca/dols/at-a-glance> (accessed 17 April 2020)
- Select Committee on the Mental Capacity Act 2005. Mental Capacity Act 2005: post-legislative scrutiny. 2014. <https://publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/13911.htm> (accessed 17 April 2020)
- United Kingdom Supreme Court 19. Judgment: P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents), P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent). 2014. <https://www.supremecourt.uk/cases/docs/uksc-2012-0068-judgment.pdf> (accessed 17 April 2020)