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X	x	✓	X	X	X	✓	✓

# D1 DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS)

## POLICY

To ensure compliance with the requirements of the Mental Capacity Act 2005 and Mental Capacity Act Code of Practice. By providing guidance for employees to ensure they meet their roles and responsibilities and respond immediately and appropriately to issues of capacity, deprivations of liberty and restrictive practices.

This policy should be applied by making reference to the Mental Capacity Act Code of Practice.

### TO BE READ IN CONJUNCTION WITH THE FOLLOWING POLICIES

- Deprivation of liberty Safeguards
- Restrictive practice
- Management of violence and aggression
- Admission to service
- Safeguarding

### VALUE STATEMENT

The Mental Capacity Act is designed to empower people to make decisions for themselves where ever possible and to protect people who lack capacity. The ethos of the act is to have a person centred approach to decision making by ensuring the individual is as involved as possible and at the centre of all decisions made in their best interests. It sets out who can make best interest decisions on behalf of people who lack capacity, and makes it clear how they should go about this. The act also enables people to plan ahead for a time when they may lose capacity.

Cumbria Care fully embraces this ethos and places people who use their services at the heart of everything they do. Therefore the following values will be adhered to by the organisation and its employees:

- People will be empowered to be fully involved in decisions about their care and support wherever possible.
- Any decisions taken by the organisations employees on behalf of a person lacking capacity, will be in the best interests of the individual. Following the principles set out in the Mental Capacity Code of Practice.
- Cumbria Care will meet its duty of care to people who use its services by protecting them from physical and or emotional harm.

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- Any restrictive practice used will be to prevent harm, and will be a proportionate response to the likelihood and seriousness of harm.
- Cumbria Care will develop and implement relevant Policy and Procedures which adhere to the requirements and recommendations of the Department of Health Positive and Proactive Care: reducing the need for restrictive interventions.

### **SCOPE**

This Policy & Procedure is applicable to all Cumbria Care Residential Services.

The good practice guidance it contains should be read in conjunction with national and local guidance relating to the Mental Capacity Act, Deprivation of Liberty Safeguards and restrictive practice.

### **BACKGROUND TO DOLS**

The deprivation of liberty safeguards were added to the mental capacity act in 2009. This was in response to a case now commonly known as 'Bournewood.' The Bournewood case concerned a gentleman HL who lacked capacity to consent to treatment due to his autism and learning disability. He was detained in a mental health hospital. As he was not actively objecting to being there he was not detained under the mental health act. Instead he was detained under common law. Because of this he had no way of challenging his detention in a timely manner. If he had attempted to leave he would have been prevented by the hospital staff. His family challenged this detention in court saying that HL's Human Rights were being unlawfully interfered with, and they won. This case highlighted a gap in the law as it demonstrated people were being unlawfully deprived of their liberty. People who were passive and appeared to be compliant but lacked capacity to consent were being detained, but there was no lawful way of doing this. The DOLS were intended to close this gap and to provide safeguards for vulnerable people. The safeguards are an independent check to ensure care and treatment is in the persons best interests, and that any deprivation of liberty is lawful. This protects the rights of vulnerable people.

### **DEFINITIONS**

#### **LACK OF CAPACITY**

The act defines a lack of capacity as:

*'A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'*

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This means that a person lacks capacity if:

- They have an impairment or disturbance (for example, a disability, condition or trauma) that affects the way their mind or brain works.

And

- The impairment or disturbance means that they are unable to make a specific decision at the time it needs to be made.

### **BEST INTERESTS**

The act defines best interests as:

*'An act done, or decision made, under The Mental Capacity Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.'*

To help work out what is in a person's best interests The Act gives the following checklist of things that should be considered:

- *Encourage participation*
- *Identify all relevant circumstances*
- *Find out the person's views*
- *Avoid discrimination*
- *Assess whether the person might regain capacity*
- *Consult others*
- *If the decision concerns life-sustaining treatment*
- *Avoid restricting the person's rights*
- *Take all of this into account*

### **BEST INTEREST ASSESSOR (BIA)**

The BIA is an independent professional qualified in carrying out mental capacity and best interest assessments under the MCA. They are personally accountable for their decisions. The BIA and mental health assessor can not be the same person.

### **MENTAL HEALTH ASSESSMENT**

The purpose of the mental health assessment is to establish whether the person has a mental disorder within the meaning of the Mental Health Act 1983. This is to ensure the person has a medical diagnosis of being of 'unsound mind' and therefore

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does come under the scope of article 5 of the Human Rights Act. Although the person may have an impairment or disturbance (for example, a disability, condition or trauma) that affects the way their mind or brain works. It does not mean they have a mental disorder within the meaning of the Mental Health Act 1983. The mental health assessor and BIA can not be the same person.

### **DECISION MAKER**

The decision maker is the person who is proposing to carry out an act or make a decision a person's best interest. Who the decision maker is will depend on the person's circumstances and the type of decision being made.

### **LASTING POWER OF ATTORNEY - LPA**

Lasting power of attorney is a legal document that can be arranged before capacity is lost. This gives the attorney or donee the ability to make decisions on behalf of the other person. It means that the decision they make on behalf of the person is as valid as if they had made it themselves. The attorney is responsible to make sure they are acting in the persons best interest and only making decisions where the person themselves lack capacity to do so.

### **INDEPENDENT MENTAL CAPACITY ADVOCATE - IMCA**

IMCA's provide independent safeguards for people who lack capacity to make certain important decisions and, at the time such decisions need to be made, have no-one else (other than paid staff) to support or represent them or be consulted. IMCAs have the right to see relevant healthcare and social care records. Any information or reports provided by an IMCA must be taken into when making best interests decisions.

### **RELEVANT PERSONS REPRESENTATIVE (RPR)**

When a standard authorisation for a DOL is given. The supervisory body must appoint a person to be a relevant person representative. Their role is to maintain contact with the person being deprived of their liberty, and to support them in all matters relating to it. They may need to trigger a review of the DOLS or make an application to the court of protection. This is an independent role, however the RPR must work to the principles of best interests as set out in the mental capacity act. The managing authority is responsible for monitoring whether the RPR maintains regular contact.

### **MANAGING AUTHORITY**

This is the registered manager of the care home. They are responsible for applying for authorisation of a DOL.

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### **SUPERVISORY BODY**

Is responsible for considering DOL applications, commissioning the assessments required to authorise a DOL and then authorising the DOL. In our case the local authority is the supervisory body.

### **COURT OF PROTECTION**

This is a specialist court that deals with decision making for adults who may lack capacity to make specific decisions for themselves. The court of protection is superior court of record and is able to set precedent. This means it can set examples for future cases which can build expertise in all areas related to lack of capacity.

### **HUMAN RIGHTS ACT AND**

**ARTICLE 5** - The right to liberty and security protects the right of a person not to be arbitrarily deprived of their liberty.

**ARTICLE 8** - Everyone has the right to respect for his private and family life, his home and his correspondence.

DOLS came in to effect because of breaches to the article 5 rights to liberty. It gives a legal framework to deprive people of their liberty and also safeguards them. However DOLS does not give legal authority to interfere with people's article 8 rights. Therefore if the person or their family is objecting to the placement regardless of whether a DOL applies there is a risk their human rights are being infringed. We have a duty to protect people's human rights and therefore if we are aware of a potential interference we must act to protect them. This is covered in more detail in the procedure below.

If there are disputes or conflicting ideas about the capacity assessment and /or the decision that has been made the manager should raise this with the decision-maker. (more information can be found in chapter 15 of the mental capacity act code of practice)

### **WHAT IS A DEPRIVATION OF LIBERTY**

There is no arbitrary criteria that defines a deprivation of liberty. This has evolved as judgements have been passed by the court of protection. In the case of *Cheshire West and Chester Council v P* [2014], Lady Hale set out a framework referred to as the acid test. This test is currently used to determine when a deprivation of liberty is occurring.

### **THE ACID TEST**

In The acid test sets out three criteria that must be met:

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- The person must lack capacity
- They must be under continuous supervision and control
- They must not be free to leave

### **CONTINUOUS SUPERVISION AND CONTROL**

Again there is no arbitrary criteria that defines continuous supervision and control or freedom of movement. However the nature of a care home generally means that there are a number of restrictions that could amount to a deprivation of liberty. Either on their own or culmatively. This includes factors such as:

- Staff roughly knowing where someone is and what they are doing.
- Environmental devices which are primarily used for health, safety and security such as electronic key pads and call bell systems
- Moving and handling equipment such as profiling beds, rise and recliner chairs (unless they are able to use them independently.)
- Routines such as meal times, medication rounds and visiting times.
- Physical interventions such as guiding a person away from conflict or danger
- People being supervised when outside of the care home

Consideration must be given to all of the restrictions in place. More guidance can be found in the restrictive practice policy.

### **FREE TO LEAVE**

This can be determined by considering what would happen if the person failed to return to the care home. If steps would be taken to bring the person back ie: contacting the police etc then they are not free to leave.

### **WHEN TO APPLY FOR A DOL**

The managing authority is responsible to apply for a DOL if they believe a deprivation of liberty (as determined by the acid test) is likely to or is occurring. There are two types of authorisation standard and urgent.

A standard authorisation must be requested when it appears likely that at some point in the next 28 days someone will be accomodated in it's care home in circumstances that amount to a deprivation of liberty. Whenever possible the DOL must be obtained in advance.

An urgent authorisation can be given when it has not been possible to obtain the standard authorisation and the managing authority believes it is necessary to deprive

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someone of their liberty. In this case the managing authority can give itself an urgent authorisation and then obtain a standard one within seven calendar days.

Urgent authorisations should only be used in exceptional circumstances therefore it is crucial that the DOL is considered at the point the social work team contact the care home to request an assessment.

Where the DoLS has been applied for but not yet authorised, and ran out of date records must be kept of the dates and frequent email trails issued for audit and CQC purposes. Once the renewal has been returned a CQC notification must be completed and sent, with a copy of the notification to the governance team.

In Shared Lives and Supported Living Services the DOL is sent via the Social Worker to Court of Protection.

### **CAPACITY ASSESSMENT AND BEST INTEREST DECISION**

The first criteria in the acid test is, does the person lack capacity? Capacity assessments are decision specific. Therefore to meet the requirements of the acid test the person must lack capacity in the specific decision 'should the person be accommodated in a the care home for the purpose of care and treatment.'

As the social worker is usually the decision maker in this situation ie: they are the person who is proposing to carry out an act or make a decision in a person's best interest. Under the Mental Capacity Act 2005 they are required to complete a capacity assessment and best interest decision based on the best interest checklist.

### **PROCEDURE**

1. At the point the care home is contacted for admission to the service (including emergency admissions) ask if the person has capacity to make the decision to be accommodated in the care home for care and treatment.
2. If the person does not have capacity request the capacity assessment and best interest decision paperwork. This may be documented on the social workers assessment.
3. If the person does have capacity complete the normal admission to service assessments
4. During this assessment f there is any doubt that the person lacks capacity to make the decision about being accommodated in the care home complete a capacity assessment (see mental capacity act policy.)

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5. Should the social worker deem that the person has capacity, but our assessment disagrees or conflicts with this. Request the social worker reviews their assessment and inform them that this is because you will be making an application under DOLS.
6. If the person has capacity a DOLS application is not required.
7. For those people who:
  - lack capacity and a best interest decision has been made.
  - are being or are likely to be deprived of their liberty as defined by the acid test
  - and we are able to meet their needs based on our assessment.

An application for a standard authorisation must be made before admission (see timescales below.)

8. If there are still disputes or conflicting ideas about the capacity assessment and /or the decision that has been made the manager should raise this again with the decision-maker. (more information can be found in chapter 15 of the mental capacity act code of practice)
9. As part of the admission to service assessment discuss the natural restrictions of a care home environment. Also discuss the aspects of the person centred care plan that may be restrictive for them individually.
10. All services users must be involved with developing their PCCP's and risk assessments.
11. However if during these discussions the decision maker becomes concerned about whether the person is able to make part of or all of the decision then a capacity assessment should take place.
12. Fully record the discussions and out comes on the assessment paperwork.
13. None emergency admissions - Complete a the DOLS application form requesting a standard authorisation found at [www.adass.org.uk](http://www.adass.org.uk) Attach capacity assessments and best interest decisions. Detail on the application how the acid test is met for this individual. Email this to: [CentralDoLSApplications@cumbria.nhs.uk](mailto:CentralDoLSApplications@cumbria.nhs.uk)

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14. Plan the admission date for 21 days after The DOLS has been applied for.
15. Emergency admissions - Complete the DOLS application form giving yourself the urgent authorisation and requesting a standard one within seven calendar days.
16. Place a copy of the application, capacity assessments and best interest decisions in the person's file (section 14)
17. The person's family, friends, carers, IMCA should be informed that an application has been made. Record the date, time and person / people informed in the individual's supervisor notes. Also make a note of this information on the file copy of the application form.
18. The application will then be considered. More information may be requested, the application may be rejected or the six assessments required under DOLS will take place. A BIA and a mental health assessor will carry out these assessments. (see definition.)
19. An IMCA may also be appointed this is dependant on the individual case.
20. The DOLS will then either be rejected or authorised. The BIA will inform you of the outcome and reasons.
21. Once the outcome is known complete a CQC notification form for all applications.

**Community Services only** – Please be aware that it's DOL in community services (NOT DoS). The Social workers completes the applications which are then sent to the Court of Protection for the authorisation. See Appendix 1 process mapping.

### RECEIVING AN AUTHORISED DOLS

22. When a DOL is received read it thoroughly. Check if any conditions have been applied and the timescales to meet these conditions. You will need to understand and monitor these.
23. A relevant persons representative (RPR) will be named on the DOL (see definition above.) As the managing authority the manager is responsible for monitoring this person's contact. Where it is believed the contact is not sufficient for the RPR to carry out their role effectively, the manager must apply

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for a review through the supervisory body. Email this to:  
CentralDoLSApplications@cumbria.nhs.uk

24. Inform the GP (the GP may request a copy) that a DOLS is in place as this changes they way expected deaths are responded to. Note the date, time and person this was reported to in the notes and in section 14 of the office file.
25. Inform any other relevant people Note the date, time and person this was reported to in the notes and in section 14 of the office file.

### WHAT IF THE CONDITIONS OF THE DOLS ARE NOT BEING MET

26. Determine who is the responsible party for each condition of the DOL. This maybe the RPR, the supervisory body (social worker,) the managing authority or someone else.
27. Ask for an update on the progress of the condition Note the date, time and person this was requested from and their response in the notes and in section 14 of the office file.
28. If the conditions are not being followed up or are unlikely to be met in the required time scales request a review using the form found at [www.adass.org.uk](http://www.adass.org.uk)  
Email this to: [CentralDoLSApplications@cumbria.nhs.uk](mailto:CentralDoLSApplications@cumbria.nhs.uk)
29. Place a copy in section 14 of the office file. Note the date and time this application was made in the notes and section 14 of the office file.

### IN THE EVENT OF A DEATH WHERE A DOL IS IN PLACE

30. **Expected death** - Contact the GP and inform them that an individual appears to have died and they are required to visit to confirm death. Advise them the person is subject to a DOL. (Note : The death certificate has to be completed in conjunction). **The coroner does not need to be contacted.**

**From 3<sup>rd</sup> April 2017, coroners will no longer have a duty to undertake an inquest into the death of every person who was subject to a Deprivation of Liberty Safeguarding (DoLS) authorisation.**

**However, from 3<sup>rd</sup> April 2017 the death of a person subject to a DoLS authorisation does not need to be reported to the coroner UNLESS the cause**

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of death is unknown or where there is a concern about the care given having contributed to the personal death.

31. **Unexpected death** - If 999 have been called and they confirm the person has died inform them there is a DOL in place and contact the police as (28) above.
32. Phone the Police and inform them there has been the death of a person subject to a DOL and request they attend.
33. The Police **will contact the coroner where they feel the death is suspicious or there is concern over the care given and will** complete the coroners paper work and inform the coroner. (The police must stay at the home until the undertaker arrives)
32. The police will require an individual to identify the deceased person, this may be a member of staff.
33. The senior member of staff on duty should complete the coroners form only if the police advice that **the death is suspicious or there is concern over the care given** (Cumbria Coroner – Nurse or senior staff members statement.)
34. **The Coroners office should only be contacted if the police advise and the death is suspicious or there is concern over the care given where the person is subject to a DOL and the GP and Police have attended.**
35. The Nurse or senior staff member statement should be forwarded to the Coroner.
36. A copy of the full DOLS Authorisation should be forwarded to the coroner. See attached Coroners guidance <https://www.judiciary.gov.uk/wp-content/uploads/2013/10/guidance-no-16a-deprivation-of-liberty-safeguards-3-april-2017-onwards.pdf>

### MORE INFORMATION

Deprivation of liberty safeguards: code of practice

Mental capacity act code of practice  
<http://www.scie.org.uk/mca-directory/>

Department of Health – Response to the supreme court judgement / Deprivation of Liberty safeguards 22/10/2015

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<http://www.39essex.com/resources-and-training/mental-capacity-law>

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