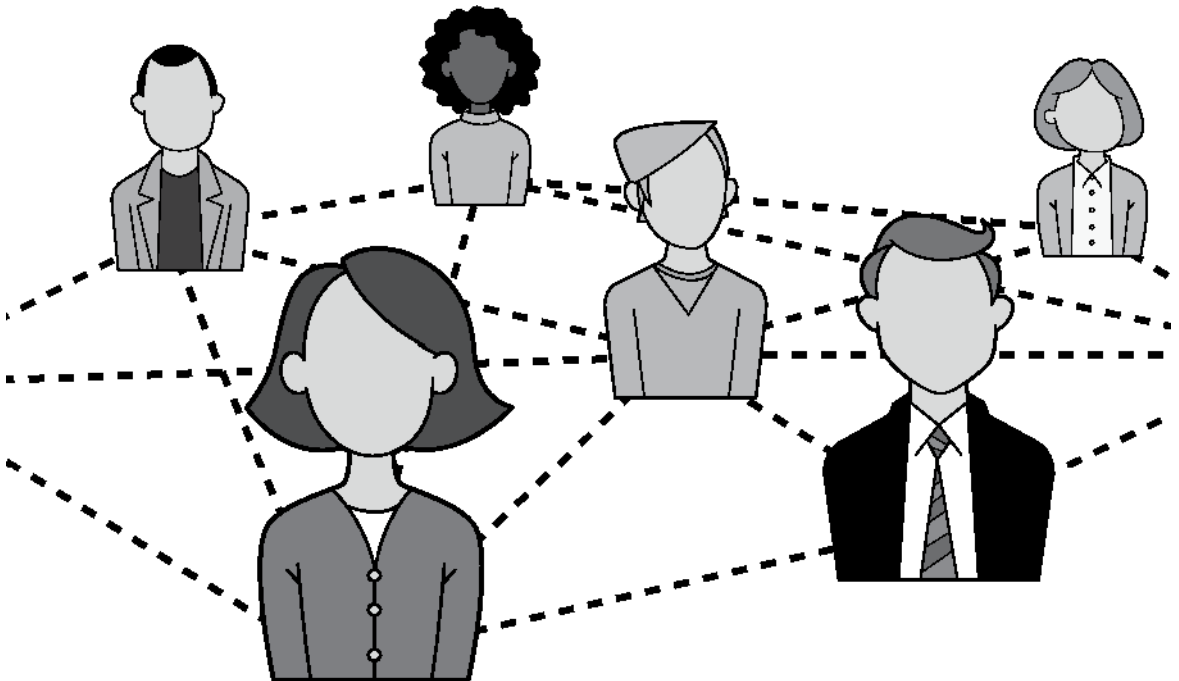


Mental Capacity Act 2005

Deprivation of Liberty Safeguards

A guide for families and carers



As the relative or carer of a person who may spend some time in hospital, a care home or supported living, it is important that you understand what the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS) are. This leaflet will help you provide effective support and know who has what rights under this legislation.

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1. What are these safeguards?

The Mental Capacity Act Deprivation of Liberty Safeguards (MCA DOLS) came into force in 2009, and are part of the Mental Capacity Act 2005.

2. Why do we have these safeguards?

The safeguards were introduced after a case called HL v the UK (also known as Bournemouth) went to the European Court of Human Rights. The case involved a man with autism and learning disabilities who could not make the decision himself about whether or not staying in hospital was the best thing for him. The hospital staff felt it was the best course of action for him to receive the care he needed but his carers disagreed and wanted to care for him at home.

Because the hospital staff made the ultimate decision to keep him in hospital, this amounted to him being deprived of his liberty (which would only usually be legally allowed if someone had committed a crime or if they were being detained in hospital under a section of the Mental Health Act).

The deprivation of a person's liberty is a very serious matter and should not happen unless it is absolutely necessary and in the best interests of the person concerned. That is why the Bournemouth case resulted in the creation of the MCA DOLS - to ensure that any decision to deprive someone of their liberty in hospital or a care home is made following defined processes and in consultation with specific authorities.

The safeguards provide legal protection for people who lack capacity who are, or may be, deprived of their liberty. They exist to provide a proper legal process and suitable protection in those circumstances where deprivation of liberty appears to be unavoidable in the person's best interests. People are protected because anyone depriving a person who lacks capacity of their liberty must be able to clearly justify the

reasons for the deprivation: it cannot be based on a vague notion of what might be best for someone. The process also allows others, including you, to question and challenge decisions about your family member.

3. Who do the safeguards apply to?

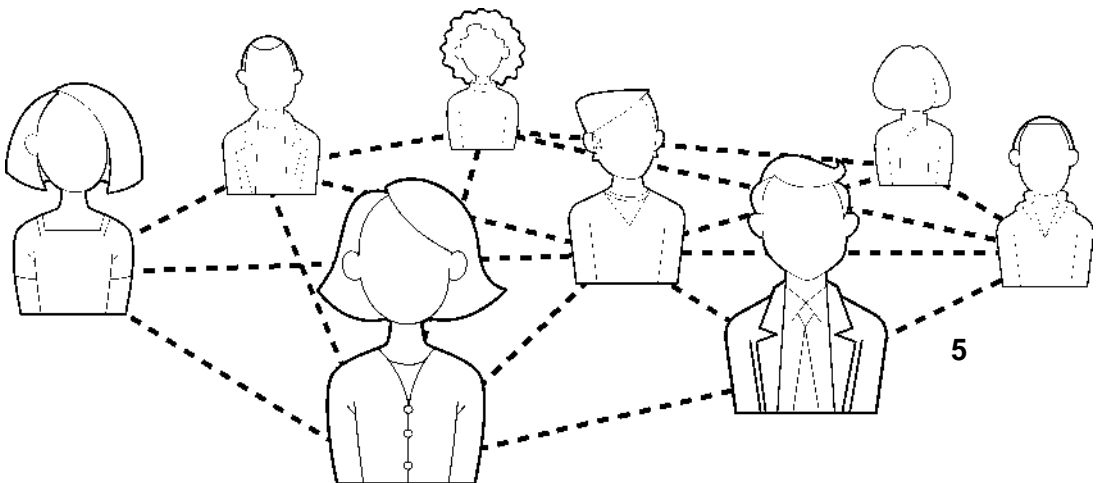
The safeguards only apply to people who:

- are aged 18 years or over, who lack capacity to make some or all decisions for themselves about where their treatment and/or care is given
- need to have their liberty taken away in their own best interests, to protect them from harm
- are living in a care home, hospital or supported living.

If a person does have capacity to make their own decisions, then these safeguards do not apply.

'Mental capacity' is defined thus in the Mental Capacity Act: to lack capacity, a person has to 'have an impairment of, or a disturbance in, their mind or brain'. Examples include dementia, significant learning disabilities and brain damage.

The MCA DOLS apply whether a person is placed under public arrangements (by a local council or NHS body) or private arrangements/self funding (in a hospital, care home or supported living).



4. What is a deprivation of liberty?

There is no simple definition of a deprivation of liberty, as it is based on an individual, their environment and care. When deciding if any actions that are taken are likely to deprive an individual, people must begin by considering:

- the circumstances involving a deprivation of liberty
- how this will affect the individual
- how the deprivation will be put into place and for how long

The safeguards make it clear that staff should consider the opinions of both the person concerned and you, as part of this process.

Code of Practice

The **Code of Practice** advises on which actions might be considered a deprivation of liberty. The Code describes a 'cumulative effect', which means that one measure by itself may not be considered a deprivation, but when considered alongside other measures, could together be considered a deprivation of liberty.

The following factors either on their own, or together with other issues, might be considered a deprivation:

- physical restraint or sedation to manage challenging behaviour
- staff having 'complete and effective control' over a person's care or their movement ie staff making all decisions regarding the person, whether or not the person would agree or not to these decisions. This might include the person's:
 - assessments
 - treatment

- how much contact, and with whom, the person has with others
- where the person lives
- privacy eg putting someone under constant supervision

The Code of Practice states that every effort should be made to avoid a deprivation of liberty. The decision-maker should consider all other options available and wherever possible choose a 'less restrictive' alternative. Only when all of these have been considered should a deprivation be an option.

For example, less restrictive alternatives may be achieved by:

- helping a person to communicate their needs in other ways
- having a different approach to their care such as changes to staffing levels or changes in medication

Services should be able to justify the actions and decisions they take, regarding your family member's care, to your family member and you. Staff should follow the guidance given in the Code of Practice which identifies ways to help minimise risk and involve the person, their family and carers within the decision-making process. This includes:

- ensuring that staff make decisions in a structured way, that decisions are regularly reviewed and the reasons for making decisions are recorded
- staff using Person Centered Planning (PCP), or similar good practice care planning. (PCP plans individual support for a person and assists people to make plans for their future.)
- staff ensuring that the person has a proper assessment of capacity
- staff considering all options, prior to the person being admitted into a care home, hospital or supported living

- staff supporting the person to maintain contact with their family, carers and friends
- ensuring that each care plan is regularly reviewed

Who is involved in managing a deprivation of liberty?

The **managing authority** is the person or body who manages the care home, hospital or supported living where your family member lives. Their main role will be providing care or treatment to your family member and the other people who live there. It is their responsibility to be concerned about whether the care and treatment they are providing to your family member amounts to a deprivation of liberty. They should take actions to ensure that all other less restrictive options are considered before deciding to make an application for a deprivation of liberty authorisation.

The **supervisory body** is the local council or the NHS who is funding the service which your family member is receiving.

5. What if you are concerned that your family member is being deprived of their liberty without authorisation?

Firstly, contact the managing authority and request a review, with the aim of reaching an agreement on changing your family member's care regime. However, you should call the police if you are concerned that abuse is taking place.

Secondly, you can ask the care home, hospital or supported living to apply for an authorisation. They are required to reply to you within a reasonable time; this usually means within 24 hours.

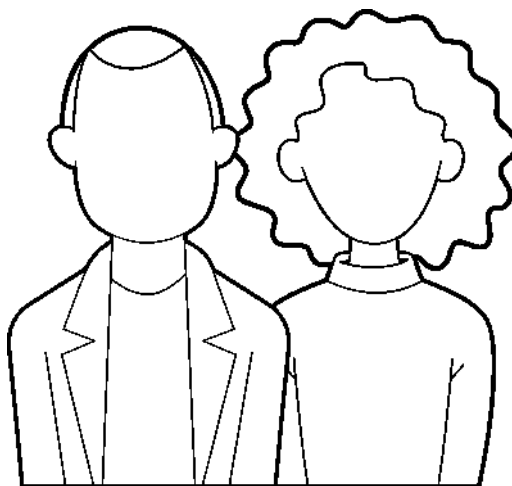
If the managing authority does not apply for an authorisation following your concern, you can take the issue to the supervisory body.

The supervisory body can then arrange a **best interests assessment** to determine if your family member is being deprived of their liberty. However, the supervisory body may not do this if a decision has already been made, or it is felt that your concern is 'frivolous'. If dissatisfied at this point, you can contact the Office of the Public Guardian or use the supervisory body's complaints procedures.

6. Should family members and carers be involved in an assessment?

As a family member, you will usually be involved in any assessments around your family member. The 'best interests' section of the Mental Capacity Act states a legal obligation to involve anyone who is involved in the care of the person, or any interested person, within the decision-making process. This is particularly true if you have a legal role regarding your family member eg you are a donee regarding their lasting power of attorney.

If you are dissatisfied with any decisions around this, in the first instance you can use the managing authority's or supervisory body's complaints procedure.



7. Who is involved?

Following a request from the managing authority, the supervisory body will arrange for your family member to be assessed by at least two different people, and to use this information to make a decision. If the assessments agree that your family member is being deprived of liberty, then the supervisory body will need to authorise the deprivation of liberty.

The supervisory body also:

- decides how long the authorisation will last
- decides when it should be reviewed
- appoints a relevant person's representative
- provides an independent mental capacity advocate (IMCA) for extra support where needed
- decides when an authorisation meets the criteria for review

8. Assessment process

If it is considered that your family member is at risk of being deprived of liberty, then they will undergo a series of six assessments:

1. **Age:** to check the person is aged 18 years or over.
2. **No refusals:** to check if your family member made an advance decision to refuse treatment or a lasting power of attorney, which is in conflict with the potential deprivation.
3. **Mental capacity:** to assess if your family member can make the decision themselves or if they lack capacity to do this. This assessment will follow the principles of the Mental Capacity Act 2005.

4. Mental health: to find out if your family member has a medically diagnosed mental disorder as defined in the Mental Health Act 1983, which can include people with learning disabilities. It is not to assess if your family member needs mental health treatment. It will be carried out by an approved doctor.

5. Eligibility: to check if there are reasons why an authorization for DOLS cannot be given eg your family member has other requirements under the Mental Health Act 1983.

6. Best interests: to decide if the deprivation is necessary to protect your family member from harm and is a proportionate response to the likelihood and severity of that harm. This might include being harmed by others as a result of their lack of capacity eg regarding risk.

How will it work?

- The supervisory body will decide the order of the assessments.
- The mental health assessor and the best interests assessor must be two different people.
- The other four assessments can usually be done by either of these assessors or other eligible assessor as defined by the Code of Practice.
- The role of the best interests assessor is of particular importance to you as a family member or carer, as this is the assessment where you will be involved.

The best interests assessor will:

- work in line with the Mental Capacity Act 2005 principles and best interests checklist
- decide if a deprivation of liberty is taking place or is likely to take place

- review all relevant assessments and care plans
- seek the views of any interested person eg the person, their family members and relatives, carers, advocates, donee or deputy
- consider any other relevant factors
- make recommendations as appropriate eg who might be appointed as your family member's representative, or the duration of the authorisation

For each of the other five assessments, the relevant assessor will gather the information about your family member that is required by the criteria for that particular assessment. They will then record their assessment and report the results, giving copies to:

- the managing authority
- your family member and their representative
- any IMCA involved

9. When can an authorisation be given?

When all assessments are completed, the supervisory body will use these to decide whether to give an authorisation. The supervisory body has three options:

An authorisation is given

The supervisory body will inform your family member and their representative, the managing authority and other relevant interested persons, stating for how long the authorisation is in place and the reasons they are giving the authorisation. They will appoint a representative for your family member. The supervisory body will carry out any review of the authorisation as require.

An authorisation is not given

This could be because the requirements are not met. This might be because your family member is not actually suffering a deprivation of liberty. Another reason might be poor working practices or staffing issues which mean eg your family member can't access the local community.

If issues are raised about the standard of care, then you have the right to complain. Request a copy of the care home, hospital or supported living complaints procedure and this will explain who you need to contact.

An authorisation is given with conditions

This means certain conditions have been attached to the authorisation by the best interests assessor eg your family member can go to certain venues, but can only have contact with certain people if they have someone else there to support them.

Authorisations should be requested before a deprivation of liberty happens. Under the Code of Practice rules, assessments should take no longer than 21 days in total, so a managing authority should apply for an authorisation in enough time to accommodate this.

However, in some cases it may not be possible to wait for a standard authorisation to be completed before depriving your family member of liberty, if it is considered that they are at serious risk of harm eg a sudden change in a person's mental health

In this kind of special situation, the managing authority can give an **urgent authorisation** for up to seven days. Urgent authorisations cannot be granted without a simultaneous application for a standard authorisation being made to the supervisory body. If the six assessments cannot be completed within this time and there are exceptional reasons for this, the

supervisory body can extend the urgent authorisation by a further seven days, to allow the assessments to be completed.

Authorisations will usually be given for the shortest possible timescale eg three months. The maximum timescale for an authorisation is 12 months. If it is likely that your family member will still need to be deprived after 12 months, then the managing authority will need to make a new application to the supervisory body to ensure that they are depriving your family member lawfully.

10. Who is the relevant person's representative?

Everyone who is subject to an authorisation has to have a **relevant person's representative**, who is appointed by the supervisory body. This person is independent of the hospital or care home, and is appointed to maintain contact with your family member, to represent and to support them in all matters relating to the MCA DOLS.

To be the representative, you need to be:

- over 18 years of age
- able to keep in contact with your family member
- willing to take on the role

As the relevant person's representative must be independent of the hospital, care home or supported living, you cannot take this role if you are involved in the managing authority, supervisory body or in your family member's care plan or treatment.

The relevant person's representative will be supported within their role, and it is the managing authority's responsibility to ensure that this person is aware of the support that is available. Extra support is available from an independent mental capacity advocate if your family member or their representative needs this to access the review process or the Court of Protection.

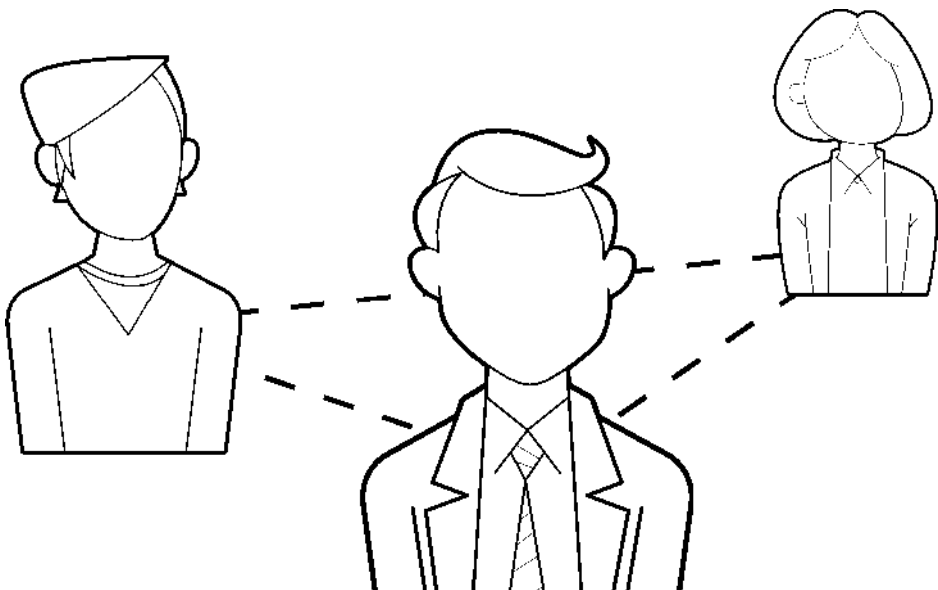
The relevant person's representative will usually be recruited from family members or friends. Where the person has no one to support them, the supervisory body must appoint a paid representative to undertake this role.

11. Who is an independent mental capacity advocate?

An Independent Mental Capacity Advocate (IMCA) is a special kind of advocate, who is used to support specific people in specific situations. They are an additional safeguard for particularly vulnerable people. An IMCA is only involved when an individual lacks capacity to make some or all decisions for themselves.

In relation to deprivation of liberty, an IMCA may be called on for the following reasons:

- when the person being deprived of their liberty has not got anyone else who could represent them
- if your family member or their representative requests additional support from the IMCA to access the review process or the Court of Protection
- if the supervisory body feels that an IMCA might be needed to meet certain requirements



12. When will an authorisation be reviewed?

It may be that your family member no longer meets the requirements of the authorisation or there may have been a change in their situation. If this is the case, the following people can ask the supervisory body for a review of the authorisation:

- your family member
- your family member's representative
- your family member's IMCA
- the managing authority

The supervisory body will decide if an authorisation meets the requirements for a review and if so, will conduct the review process. The supervisory body will inform your family member, their representative and the managing authority that they are doing so.

13. What is the Court of Protection?

The Court of Protection is a specialist court for all issues relating to people who cannot make some decisions for themselves. The Court of Protection can:

- change or terminate an authorisation
- instruct a supervisory body or managing authority to change or terminate an authorisation

The following people have automatic right to apply to the Court of Protection:

- the donee of your family member's lasting power of attorney
- a court-appointed deputy for your family member
- your family member's representative

If you want to apply to the Court of Protection on behalf of your family member but you do not fit any of the above categories, you first have to obtain permission of the court before making an application.

14. How are the safeguards monitored?

The managing authority has a duty to monitor your family member's situation on an ongoing basis.

To ensure that the MCA DOLS are being used in a proper and legal way and that no one is being detained improperly, the MCA DOLS is monitored by the **Care Quality Commission** (CQC). This body is responsible for the regulation and monitoring of adult social care and health across England, in addition to looking after the interests of those detained under the Mental Health Act.

CQC will monitor how the safeguards are being used by:

- visiting registered care homes and hospital wards
- speaking with the patients/ residents who live there (if appropriate to do so)
- checking the hospital or home's records and documentation

You can get further information about CQC from:
National Customer Service Centre, Citygate, Gallowgate,
Newcastle Upon Tyne, NE1 4PA

Website: www.cqc.org.uk
Email: enquiries@cqc.org.uk
Telephone: 03000 616161

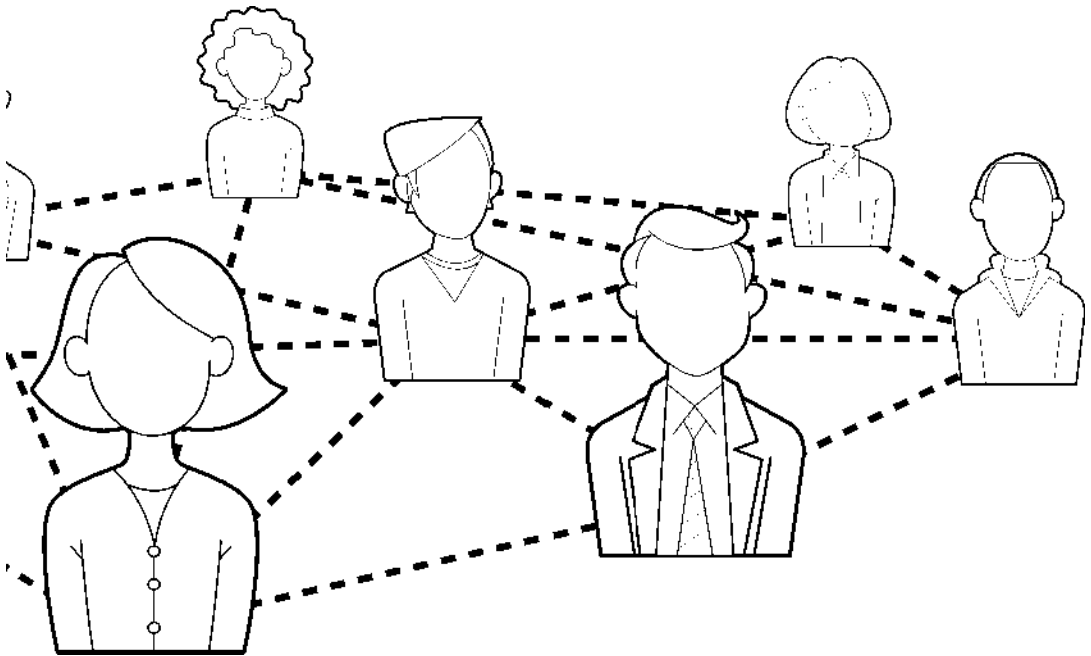
15. What is the Code of Practice?

The Code of Practice is a 'rule book' for people using MCA DOLS. It is a useful resource and the following people have to follow it, to make sure that they are acting in a lawful way:

- anyone who has a role which relates to the MCA DOLS
- anyone who acts as a 'relevant person's representative'

You can:

- download a copy of the Code of Practice from <https://www.gov.uk/court-of-protection>



16. Further information

If you are concerned that the person you care for is being detained or deprived of their liberty in a way that you feel is not right or legal, you can:

- Visit the Department of Health MCA DOLS website www.dh.gov.uk

Tel: 020 7210 4850
New Kings Beam House
22 Upper Ground
London
SE1 9BW

- Contact the Office of the Public Guardian for further advice and information www.gov.uk/court-of-protection

Office of the Public Guardian
PO Box 15118
Birmingham
B16 6GX
Tel: 0300 456 0300

For more information on the Mental Capacity Act 2005 (MCA), see the guide **Making decisions: a guide for family, friends and other unpaid carers**, available from the Ministry of Justice

www.justice.gov.uk

Tel: 020 3334 3555
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London
SW1H 9AJ

Livability thanks The National Autistic Society,
Action on Elder Abuse and Bild for permission to
adapt their original text All about the Deprivation
of Liberty Safeguards and You.



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