# Mental Capacity Act Policy
## (including Deprivation of Liberty)

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| **Directorate:** | Social Care, Health, and Housing (SCHH)<br>Children's Services | | |
| **Division & Service:** | Adult Social Care & Children's Services | | |
| **Author:** | Jo Bellamy, Policy & Performance Officer<br>Dan Baker, Mental Capacity Act and Deprivation of Liberty Safeguards Lead Officer | | |
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This document is not controlled when printed.

It is the responsibility of every individual to ensure that they are working to the most current version of this document.

## Contents

## 1. Introduction

1.1. The Mental Capacity Act 2005 provides a statutory framework for people who lack capacity to make decisions for themselves. It sets out who can take decisions, in which situations, and how they should go about this.

1.2. The Mental Capacity Act 2005 (MCA) was implemented in 2007 and the Mental Health Act 2007 included an amendment to the MCA (SCHEDULE A1) to introduce additional Deprivation of Liberty Safeguards implemented from 2009.

1.3. The Deprivation of Liberty Safeguards (DoLS) provide a legal framework to protect those who may lack capacity to consent to the arrangements for their treatment or care and where levels of restriction or restraint used in delivering that care are so extensive as to potentially be depriving the person of their liberty. The safeguards apply where that person's care is being delivered in a registered care home or hospital and has not been authorised under the Mental Health Act 1983.

1.4. In 2014 a judgement from the Supreme Court in the case of Cheshire West clarified an "acid test" for what constitutes a "deprivation of liberty". This judgement in effect widened what was previously considered to be the definition of Deprivation of Liberty resulting in more people falling within its scope. It also introduced the notion that a deprivation of liberty can occur in community and domestic settings. Such situations, relating to adults, fall outside the scope of the Deprivation of Liberty Safeguards (SCHEDULE A1) and for the purpose of this policy we will be referring to such arrangements as a 'Deprivation of Liberty in the Community' (DoLC) to cover all circumstances relating to adults that fall outside of the Deprivation of Liberty Safeguards. Deprivation of liberty of those aged 16-17 in a managed setting will be referred to as a Young Person (16-17) Deprivation of Liberty and those under 16 years of age will be referred to as an under 16 Deprivation of Liberty. Young people aged 16 and 17 that are deprived of their liberty in a community setting are included in DoLC whereas those under the 16 years of age require court approval.

1.5. At the time of reviewing this policy (November 2021), an amendment to the Mental Capacity Act 2005 has been enacted called The Mental Capacity (Amendment) Act 2019 but it is not yet been implemented. At present the Deprivation of Liberty Safeguards still apply and therefore this policy remains largely unchanged.

1.6. When more detail is confirmed about the new framework—the Liberty Protection Safeguards (LPS)—for authorising arrangements giving rise to a deprivation of liberty to enable the care and treatment of people who lack capacity to consent to them in England and Wales, this policy will need further revision.

1.7. The intention of this policy is to give an overview of how the Council meets its MCA duties in its Adult Social Care and Children's Services functions. The Council's approach to Deprivation of Liberty Safeguards and Deprivation of Liberty in the Community are also included in this policy.

1.8. This policy and its related practice guidance are not intended as a substitute for the MCA or for the DoLS Code of Practices and links are therefore used to guide colleagues to the legislation and guidance around the issues dealt with in this policy.

1.9. Staff must make themselves familiar with this legislation and guidance so as to protect themselves from liability under section 5 of the MCA.

## 2. Purpose

2.1. The purpose of this policy is to ensure that Central Bedfordshire Council (CBC) staff, specifically Social Care, Health and Housing and Children's Services Directorate staff have systems and quality assurance processes in place to comply with the MCA including Deprivation of Liberty Safeguards and other forms of deprivation of liberty.

2.2. Within the planning and procurement of adult social care, colleagues who work with clients to make decisions have a role in ensuring that those aged over 16 have the right to make their own decisions if they have the capacity to do so. Where they do not have the capacity, colleagues must ensure that decisions are made in the person's best interests and are least restrictive to the person's rights and freedom of action.

2.3. This document provides a framework to maximise staff awareness of the legal responsibilities and duties that must be undertaken.

## 3. Scope, definitions and related policies

### 3.1. Scope

3.1.1 This policy covers the Council's approach to implementing the MCA in its Adult Social Care and Adult Social Care Commissioning functions and Children's Services and Children's Services Commissioning functions. The Council's approach to DoLS, DoLC, Young person (16-17) Deprivation of Liberty (YPDoL) and Under 16 Deprivation of Liberty (U16DoL) are also included in this policy.

3.1.2 Practice guidance and processes have been produced for staff to explain the method for delivering the requirements of the MCA and DoLC, DoLS, YPDoL and U16DoL.

### 3.2. Definitions

3.3.1 **Acid test** - The Supreme Court judgment of 19 March 2014 in the case of Cheshire West clarified an "acid test" for what constitutes a "deprivation of liberty". The acid test states that an individual is deprived of their liberty for the purposes of Article 5 of the European Convention on Human Rights if they:

- Lack the capacity to consent to their care/ treatment arrangements
- Are under continuous supervision and control
- Are not free to leave.

All three elements must be present for the acid test to be met.

3.3.2 **Best Interests** - The best interests principle underpins the MCA and it covers all aspects of financial, personal welfare and healthcare decision-making and actions. It applies to anyone making decisions or acting under the provisions of the Act. When working out what is in the best interests of the person who lacks capacity to make a decision or act for themselves, decision-makers must take into account all relevant factors that it would be reasonable to consider, not just those that they think are important. The Code of Practice sets out factors that should be considered when considering best interest decisions.

3.3.3 **Best Interests Assessor (BIA)** - For the **purposes** of the Deprivation of Liberty Safeguards – Assessors will be from one of the following disciplines, with relevant

experience and have completed specific accredited training to carry out Best Interests Assessments under DOLS:

- Approved Mental Health Practitioner (AMHP)
- Registered Social Worker
- Registered Nurse
- Registered Occupational Therapist
- Chartered Psychologist.

3.3.4 **Capacity** - Where the term 'capacity' is **used** in this document it refers to a person's ability to make their own choices and decisions. Capacity is considered in terms of specific decisions about particular matters at particular times.

3.3.5 **Deprivation of Liberty in the Community (DoLC)** – Case **law** (March 2014 Supreme Court judgement) highlighted the potential for DoLC and the requirement to have any such arrangements scrutinised and authorised if considered to be in the relevant person's best interests. Central Bedfordshire Council, as a local authority funding care in community settings, is responsible for identifying those individuals receiving care in the community who may lack capacity and be subject to a deprivation of liberty. Department of Health guidance Response to the Supreme Court Judgement/ Deprivation of Liberty Safeguards (October 2015) recommends that DoLC policies and procedures should be based on the MCA principles and should prioritise those individuals who stand to benefit most from this scrutiny of their care arrangements. DoLC must be authorised by the Court of Protection.

3.3.6 **Deprivation of Liberty Safeguards (DoLS)** - Deprivation **of** Liberty Safeguards (DoLS) protect adults aged 18 and over that are under continuous supervision and control, not free to leave and lack capacity to consent to these arrangements. DoLS prevents arbitrary decisions to deprive a person of their liberty and provides a robust and transparent framework in which to challenge deprivation of liberty authorisations.

3.3.7 **Host Authority (HA)** – the local authority in the **geographic** locality of the registered care home or hospital in which the relevant person is receiving care or treatment but where the local authority is not also the supervisory body.

3.3.8 **Independent Mental Capacity Advocate (IMCA)** – There **are** a number of different IMCA roles involved in supporting and representing people who may be subject to the Deprivation of Liberty Safeguards. These are set out in Section 39 of the amended MCA. It is important to be clear which role an IMCA is taking, as they are instructed for different reasons and have different rights and responsibilities. The roles are:

- Section 39A IMCAs are instructed when there is an assessment in response to a request for a standard authorisation, or a concern about a potentially unauthorised deprivation of liberty.
- Section 39C IMCAs cover the role of the relevant person's representative when there is a gap between appointments.
- Section 39D IMCAs support the person, or their relevant person's representative, when a standard authorisation is in place.

3.3.9 **Lacking capacity** - Where the term 'lack of capacity' is **used** in this document it refers to 'a person's inability to make a specific decision about a particular matter at a particular time because of an impairment of, or a disturbance in the functioning of, the

mind or brain'. Such an inability must be evidenced following the test set out in section 2 and 3 of the Act.

3.3.10 **Managing Authority (MA)** – The person/body with **management** responsibility for the hospital/registered care home where the person is, or may become deprived of, their liberty.

3.3.11 **Mental Capacity Act 2005 (MCA)** - The MCA **empowers** and protects vulnerable adults aged 16 and over who are unable to make decisions for themselves. The MCA is intended to assist and support people who may lack capacity, and to discourage anyone involved in caring for the person from being overly restrictive or controlling.

3.3.12 **Mental Health Act 1983 (MHA)** - The MHA sets out a person's rights when they have been sectioned under the Act. This includes rights for those detained around consent to treatment and rights when being treated in the community.

3.3.13 **Paid Person's Representative (PPR)** - When a DoLS authorisation is granted the best interests assessor will be able, in most cases, to recommend somebody to be the relevant person's representative (i.e. a family member or friend). If the best interests assessor is unable to recommend anyone, the supervisory body must appoint someone to perform this role in a professional capacity. Here this is called a paid representative

3.3.14 **Relevant Person (RP)** – The person who is, or may become, deprived of their liberty.

3.3.15 **Relevant Person's Representative (RPR)** – This will usually be a close relative or friend of the relevant person. It may also be a donee of a Lasting Power of Attorney or a Deputy appointed by the Court of Protection. They are appointed by the Supervisory Body once a standard authorisation has been granted. Their role is to provide independent representation and support to the relevant person in all matters relating to the DOLS, including, if appropriate, requesting a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection. Where a Relevant Person's Representative cannot be identified the supervisory body will appoint a paid Relevant Person's Representative via an advocacy contract with an independent advocacy service provider.

3.3.16 **Restraint** - Restraint may only be used where it is necessary to prevent harm and is proportionate to the likelihood and seriousness of that harm. Someone is using restraint if they: "Use force, or threaten to use force, to make someone do something that they are resisting. Or; Restrict a person's freedom of movement, whether they are resisting or not" (Mental Capacity Act Section 6(4)).

3.3.17 **Section 12 Doctor** – A doctor trained under section 12 of the MHA to undertake assessments of mental illness under this Act. Section 12 doctors will be required to undertake separate and specific accredited training prescribed by the Royal College of Psychiatrists to carry out assessments under DOLS.

3.3.18 **Supervisory Body (SB)** – The local authority that has statutory responsibility for commissioning the required assessments and considering whether any subsequent authorisation is required and appropriate

3.3.19 **Standard Authorisation (SA)** - An authorisation given by the SB after the completion of the statutory assessment process, giving lawful authority to deprive a relevant person of their liberty in the relevant hospital or care home.

3.3.20 **Urgent Authorisation (UA)** - An authorisation the MA has given itself for a maximum of seven days, which may be extended by a maximum of a further seven days by the SB subject to certain conditions. The UA gives the MA lawful authority to deprive a person of their liberty while the SA process is undertaken.

### 3.3. Related policies

- Adult Social Care Assessment Framework
- Safeguarding Adults Policy and Procedure
- Appointeeships – Money Management Policy

## 4. Policy details

### 4.1. Introduction to the MCA

4.1.1 The issue of whether a person aged 16 years or over has the mental capacity to make a decision regarding his or her care and support needs commonly arises in social care settings. All social care professionals will potentially be in situations where they are required to assess the mental capacity of an individual to make a particular decision and to make best interests decisions.

4.1.2 Everyone working with or caring for an adult who may lack capacity to make decisions must comply with the MCA when making decisions or acting for such persons.

4.1.3 Anyone acting in a professional capacity for, or in relation to, a person who lacks capacity is also legally required to 'have regard to' relevant guidance in the Code of Practice.

4.1.4 Practitioners are expected to ensure that they are aware of and act according to case law as it develops. Two helpful resources in this regards are:

http://www.39essex.com/

http://www.mentalhealthlaw.co.uk/Main_Page

### 4.2. Statutory principles

4.2.1 The key values that underpin the MCA are set out in five statutory principles at section 1 of the Act.

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. 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 best interests.

5. 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.

## 4.3. Assuming capacity and support for decision making

4.3.1 All those working within CBC have a duty and commitment to protect vulnerable adults. Staff should work on the basis of an assumption of capacity, unless established otherwise and should consider people's capacity to take decisions as part of their normal assessment and care and support planning arrangements.

4.3.2 Staff must assume that the person has capacity unless a MCA assessment provides reasonable belief otherwise. All practicable steps must be taken to support the person to be involved with the decision making process, even if they lack capacity, through the provision of clearly communicated options and timely information and advice. A person is not to be treated as unable to make a decision merely because he makes an unwise decision. However the Council has a role in safeguarding vulnerable adults and managing risk.

## 4.4. Assessing capacity

4.4.1 It is important to carry out an assessment when a person's capacity is in doubt. The Mental Capacity Act 2005 Code of Practice (the "Code of Practice") at chapter 4, para 4.35 states that 'there are a number of reasons why people may question a person's capacity to make a specific decision' and cites:

- "the person's behaviour or circumstances causes doubt,
- somebody else says they are concerned about the person's capacity, or
- the person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown they lack capacity to make other decisions in their life."

4.4.2 It is important that any assessor has reasonable grounds for doubting a person's mental capacity prior to carrying out a formal mental capacity assessment, reasons such as those given above would likely constitute reasonable grounds.

4.4.3 Where a person may lack capacity to make a specific decision, a formal assessment of capacity may be necessary to determine capacity. The more serious the decision, the more formal the assessment of capacity needs to be. For example, the preparation of a care plan should always include an assessment of the person's capacity to consent to the actions or decisions to be taken covered by the care plan if sufficient doubts arise. Whereas day to day acts of care and support requires the assessor to have a 'reasonable belief' that the person lacks capacity to agree to the action or decision to be taken. If the person has a particular condition or disorder, it may be appropriate to contact a specialist (for example, consultant psychiatrist, psychologist or other professional with experience of caring for patients with that condition).

4.4.4 Every effort should be made to engage the person as much as possible and to communicate effectively with them and provide the best environment for the person to respond before deciding that they lack capacity to make a decision. Family, friends, carers or other professionals may also need to be involved.

4.4.5 Anyone assessing someone's capacity to make a decision for themselves should use the definition of a person lacking mental capacity as stated in Section 2 (1) of the Act:

*'For the purposes of this Act, 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.'*

4.4.6 The Code of Practice in chapter 4 examines the definition in more detail, providing what has been traditionally referred to as the two stage test.

4.4.7 Stage 1: Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain? (This is referred to as the Diagnostic test.) Examples of an impairment or disturbance in the functioning of the mind or brain may include the following:

- conditions associated with some forms of mental illness
- dementia
- learning disabilities
- the long-term effects of brain damage physical or medical conditions that cause confusion, drowsiness or loss of consciousness
- delirium
- concussion following a head injury, and the symptoms of alcohol or drug use.

4.4.8 Stage 2: Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to? (This is referred to as the Functional Test.) The person is unable to make a decision if they cannot:

- understand information about the decision to be made (the MCA calls this 'relevant information');
- retain that information in their mind
- use or weigh that information as part of the decision-making process, or
- communicate their decision (by talking, using sign language or any other means). See section 3(1).

4.4.9 Case law has emphasised that the two stage test does not 'establish a series of additional, free-standing tests of capacity. Section 2(1) is the single test, albeit that it falls to be interpreted by applying the more detailed description given around it in ss 2 and 3.' In particular the two stages are linked by the requirement to considering whether that inability is because of an impairment of, or a disturbance of the functioning of, the mind or the brain (PC and Anor v City of York Council {2013 EWCA CIV 478 [56]).

4.4.10 The two stage test should therefore be considered more of a single test consisting of three elements:

(1) Is there an impairment or disturbance? If so:
(2) Is the person unable to make a decision? If so:
(3) Is this inability because of the identified impairment or disturbance?

4.4.11 The assessment must be made on the balance of probabilities.

## 4.5. Best Interests Decisions

4.5.1 Specific decisions or actions may need to be taken where a person has been assessed as lacking capacity. These decisions must be made following section 4 of the MCA and adhering to the fourth and fifth principles of the MCA:

- "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 best interests.
- 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."

4.5.2 The best interests process should be followed to safeguard the individual's human rights, ensure that their past and present wishes and feelings are at the centre of the decision making process and that those with an interest in the person's welfare are appropriately consulted.

4.5.3 The best interest decision making process must be used in all circumstances where decision(s) are required to be made on behalf of an incapacitated person. The best interests principle will not apply where someone has previously made an advance decision to refuse medical treatment while they had the capacity to do so.

4.5.4 If a relevant Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered with the Office of the Public Guardian, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority. Ensure that a copy of the any court order or LPa/EPA is requested from the family. If the family will not provide these, contact the Office of the Public Guardian to request a copy. In such circumstances it is the council's role to support the decision maker and this will almost certainly include information and advice on the MCA, where required, providing professional assessments and information on the available options. This is to support with following the MCA and making an informed decision.

4.5.5 In the absence of the above, a best interest decision can be made regarding the persons' care and support by staff involved in the planning or delivery of care and support of the individual. Decisions regarding medical treatment must be made by a medical professional. As a result, a range of different decision-makers may be involved with a person who lacks capacity to make different or joint decisions.

4.5.6 To come to a best interest decision staff must consider a list of factors set out in section 4 of the MCA to establish a reasonable belief that the decision is in the person's best interests.

4.5.7 Any staff involved in the care of a person who lacks capacity should keep a record of the process of working out the best interests of that person for each relevant decision. Objective reasoning for the decision must be recorded with evidence to show that the checklist set out in section 4 of the MCA has been followed and all relevant circumstances have been considered. Guidance on what should be recorded is in the Code of Practice (chapter 5).

4.5.8 When making a best interest decision, staff must also consider the impact of the decision on the person's rights and freedom of action. If any subsequent best interest decision goes against what the person has expressed in the past, or is currently expressing, great caution is required. Likewise, if any of their human rights are

potentially engaged, including a person's right to liberty and private and family life. When exploring each option, consideration must be given to whether the purpose of what is trying to be achieved can be met in any lesser restrictive way of the person's rights and freedom of action.

4.5.9 If any subsequent best interest decision potentially interferes with their past or present wishes, as far as they can be ascertained, or any of their human rights under the European Convention on Human Rights (ECHR), legal advice, the Deprivation of Liberty Safeguards (adult care homes or hospitals) or Court of Protection might be required.

4.5.10 If it is in the person's best interests to deprive them of their liberty, this should be done with the minimum restriction. Ensure that any DoLS is authorised.

## 4.6. Deprivation of liberty

4.6.1 Deprivation of liberty is a term used when a person's freedom is taken away through restraint, restriction of movement and control, including the threatened or actual use of force. Its meaning in practice is being defined through case law. A decision as to whether or not Deprivation of Liberty arises will depend on the particular circumstances of each situation.

4.6.2 In the circumstances of a best interest decision for an incapacitated person aged 16 or 17 to be accommodated in any setting, consideration must be given to whether the care plan requires authorisation by the Court of Protection. This is referred to as a Young person (16-17) Deprivation of Liberty and is managed by Children's Services.

4.6.3 In the circumstances of a best interest decision for an incapacitated person over the age of 18 to be accommodated in a care home or hospital, the DoLS regime under Schedule A1 of the MCA may be required for authorising any potential deprivation of liberty contrary to Article 5, right to liberty, of the ECHR. This is referred to as Deprivation of Liberty Safeguards and is managed the Supervisory Body within Adult Social Care.

4.6.4 In the circumstances of a best interest decision for an incapacitated person over the age of 18 potentially being deprived of their liberty in any setting other than registered care homes or hospital consideration must be given to whether the care plan requires Court of Protection authorisations. This is referred to as Deprivation of Liberty in the Community and is dealt with by Adult Social Care and Children's Services, depending on the whether the Care Plan is primarily managed by Adult Social Care or Children's Services.

4.6.5 In the circumstances of a best interest decision for a child under 16, potentially being deprived of their liberty in any setting, consideration must be given to whether the care plan requires authorisation by The High Court under Inherent Jurisdiction. This is referred to as a Child (Under 16) Deprivation of Liberty and is dealt with by Children's Services.

## 4.7. Restrictions of private and family life

4.7.1 In the circumstances of a best interest decision for an incapacitated person over the age of 16 which that may result in restrictions on private and family life (including contact) legal advice must be sought.

4.7.2 The MCA does not provide authority to interfere with private and family life, home and correspondence (Article 8) even in safeguarding of vulnerable adult situations.

4.7.3 The outcome of the best interest decision making process should be recorded and decisions reviewed where necessary. At the point that a best interest decision has been made, consideration should be given to whether it may potentially interfere with any of the person's human rights.

4.7.4 Best interest decisions must be regularly reviewed; especially when there is a significant change in the relevant person's circumstances or the options available to the person have changed.

## 4.8. Safeguarding procedures

4.8.1 A deprivation of liberty can often also be considered a safeguarding concern. In the majority of these situations the deprivation of liberty process should be prioritised as this should also deliver outcomes that safeguard the individual, i.e. is the least restrictive of the person's rights and freedoms and in their best interests. Safeguarding procedures would therefore not be required.

4.8.2 However, in situations where the risks are extremely high, the safeguarding process can run alongside the DoL process. Factors that practitioners should consider when deciding whether to trigger the safeguarding process in DoL cases include:

- Restrictions that are disproportionate to the level of harm identified,
- Restrictions that are avoidable and unnecessary,
- Where there is objection from the person or their family.

## 4.9. Deprivation of Liberty Safeguards

4.9.1 The Deprivation of Liberty Safeguards were incorporated into the MCA in 2009, following amendments introduced by the Mental Health Act 2007. The safeguards are designed to prevent unlawful deprivations of liberty, to provide safeguards for those whose liberty is deprived to prevent them from coming to significant harm and to ensure all decisions made on their behalf are in their best interests.

4.9.2 The safeguards cover patients over the age of 18 in hospitals and people in care homes registered under the Care Standards Act 2000, whether placed under public or private arrangements.

4.9.3 The safeguards provide a framework for authorising a deprivation of liberty for people who lack the capacity to consent to their accommodation for the purposes of receiving treatment or care in either a hospital or care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty.

4.9.4 The safeguards aim to:

- Ensure that people can be given the care and support they need in the least restrictive environment;
- Prevent arbitrary decisions that deprive people of their liberty;
- Provide safeguards for vulnerable people who lack capacity, and
- Provide people with rights of challenge against unlawful detention.

4.9.5 The threshold for what care or treatment amounts to a deprivation of a person's liberty is subject to case law. Care homes and hospitals do not need to be experts on what exactly does or does not amount to a derivation of liberty, they only need to understand when someone might be deprived and make the required authorisation requests. If there is any doubt, it is advisable for the MA to err on the side of caution and make the request to the relevant SB. For details on what amounts to a deprivation of liberty, MAs are advised to liaise with the MCA and DoLS Lead Officer in ASC.

4.9.6 The MA has responsibility for applying for authorisation of a deprivation of liberty for any person who may come into the scope of the Deprivation of Liberty Safeguards (Code of Practice, para 3.1). The MA can itself give an urgent authorisation for deprivation where: '…it believes that the need for the person to be deprived of their liberty is so urgent that deprivation needs to begin before the [standard] request is made…' (Code of Practice, para 6.1). The MA must keep a written record of each request made for a standard authorisation and the reasons for making the request (Code of Practice, para 3.13).

4.9.7 The MA should tell the relevant person's family, friends and carers, and any IMCA already involved in the relevant person's life, that it has applied for an authorisation of deprivation of liberty unless it is 'impractical or impossible to do so, or undesirable in terms of the interests of the relevant person's health and welfare…' (Code of Practice, para 3.15).

4.9.8 MAs should have a procedure in place for when and how to apply for an authorisation. The procedure should identify:

- whether deprivation of liberty is or may be necessary in a particular case
- what steps they should take to assess whether to seek authorisation whether they have taken all practical and reasonable steps to avoid a deprivation of liberty
- what action they should take if they do need to request an authorisation
- how they should review cases where authorisation is or may be
- necessary, and
- who should take the necessary action. (Code of Practice, para 3.6).

Refer to the code of practice for guidance on the Deprivation of Liberty Safeguards processes.

4.9.9 The Supervisory Body is required to respond to requests for authorisations within the mandated deadlines under the DoLS regulations. Urgent authorisations must be made within seven calendar days of the receipt of the application, with one possible extension of another seven days. Assessments must be completed for applications for a standard authorisation within 21 calendar days of the receipt of the application.

4.9.10 DoLS applications are processed by the MCA/DoLS team. Applications are allocated to Section 12 doctors and Best Interests Assessors by the DoLS Business Support Officer or DoLS Administrator.

4.9.11 In exceptional circumstances where the Council has received a significant number of applications and is at risk of severely exceeding the deadlines for making decisions on DoLS applications, the Council will use the ADASS screening tool to prioritise applications. This will ensure that the Council responds in a timely manner to those

requests which have the highest priority. The DoLS Business Support Officer or DoLS Administrator will refer to this prioritisation tool when required. It is Central Bedfordshire Council's intention however not to routinely require the use of the prioritisation tool and that all standard requests are allocated in a timely manner.

4.9.12 Where decisions on applications are delayed, the Council will offer support and advice to MAs to ensure the best outcomes for the relevant person in the interim period.

4.9.13 Where the practitioner is aware of a person moving to a new placement or has a change in circumstances that is likely to deprive the person of their liberty, the practitioner must advise the Managing Authority that a DoLS application is required. The practitioner will check whether a DoLS authorisation is in place within eight weeks of the change in care regime. Where a DoLS application has been submitted but not authorised, this will be escalated to the MCA/DoLS Lead Officer to expedite the application. Where a DoL application has not been made, the practitioner must review the care regime to clarify if the person is still potentially being deprived of their liberty. If the person is still understood to be subject to a DoL the DoLS Team will require the MA to submit an urgent DoLS application within 24 hours of the practitioner's assessment. In exceptional circumstances, a third party application will be made by the assessing practitioner.

4.9.14 The DoLS Business Support Officer and Administrators in Adult Social Care should bring complex and high risk DoLS cases to the attention of the MCA/DoLS Lead Officer for quality assurance purposes and guidance where required. This includes situations such as:

- The relevant person is identified as objecting to the arrangements,
- Any person consulted during the assessment process is identified as objecting to the arrangements,
- There are adult safeguarding concerns or care standard issues identified by either assessor,
- Either assessor has identified a person to have mental capacity regarding the accommodation but is not consenting,
- Any other matter that causes concern for the legality of the continued accommodation or welfare of the relevant person or other vulnerable adults.

4.9.15 Team managers are responsible for quality assurance of DoL cases in Children's Services.

## 4.10. Deprivation of Liberty in the Community

4.10.1 A DoLC is a deprivation of liberty of a person aged 16 or over in a domestic setting. Domestic settings are supported living services, shared lives schemes (formerly known as adult placements) and extra care housing as well as domiciliary arrangements within a person's own home which may amount to a deprivation of liberty. A Deprivation of Liberty in the Community must be authorised by the Court of Protection.

4.10.2 If the person is 16 or 17 and the deprivation of liberty occurs in the family home, private fostering home, educational placement, or adoptive home the parental responsibility rests solely with the parent(s), if the decision is within the zone of

parental responsibility, rather than the State and so is analogous to the family home. Consideration should always be given to whether authorisation of any placement is necessary by the Court of Protection. Where unsure legal advice should be sought.

4.10.3 Where a Central Bedfordshire Council practitioner (in Adult Social Care or Children's Services identifies a potential DoLC) they are responsible for ensuring that the appropriate care and support assessments are undertaken and the DoLC screening tool is completed with support from their team manager. Advice and guidance should then be sought from CBC's legal services in regards to making an application to the Court of Protection.

4.10.4 A CBC practitioner might become aware of a potential DoLC via a number of triggers including:

- Safeguarding referral
- New customer
- Support plan review following a move
- Annual support plan review
- Transition from Children's to Adult Social Care Services
- Support plan review following a crisis
- Request from the community setting care provider.

4.10.5 A request for legal advice on a DoLC should be approved by the Head of Service. Applications to the CoP are completed by the relevant assessing team and submitted by legal services.

4.10.6 Where a DoLC has been authorised by the Court of Protection, the date of the authorisation and a date for review will be recorded. The review date will be flagged to ensure the re-application, where necessary, is timely. This will be the responsibility of the Social Worker in Children's Services if the person is aged 16 or 17 or if they are aged 18 or over and their Care Plan is managed primarily by Children's Services. The relevant team in ASC will be responsible if the person is aged 18 or over and their Care Plan is managed primarily by Adult Social Care Services.

## 4.11. Young person (16-17) Deprivation of Liberty

4.11.1 Young people aged 16 to 17 can be deprived of their liberty in a range of managed settings such as children's homes (secure, non-secure, and certain special schools), care homes, residential special schools, boarding schools, further education colleges with residential accommodation, and hospitals. Young people that are deprived of their liberty in a managed setting should have their application dealt with in a similar way to DoLC.

4.11.2 When assessing the young person's best interests, the person providing care or treatment must consult those involved in the young person's care and anyone interested in their welfare – if it is practical and appropriate to do so. This may include the young person's parents. Care should be taken not to unlawfully breach the young person's right to confidentiality (see chapter 16 of the Code of Practice).

## 4.12. Child (Under 16) Deprivation of Liberty

4.12.1 The MCA does not apply to under 16s and the jurisdiction of the Court of Protection to authorise deprivation of liberty is available only from the age of 16. However it is

recognised that a local authority can potentially infringe a child's human rights of liberty if that child is under care arrangements.

4.12.2 Where CBC has statutory parental responsibility (see s.33(3)(a) of the Children Act 1989) for a child as the child is subject to an interim care order, or a final care order, the Council should consider seeking authorisation for what would otherwise amount to a deprivation of liberty.

4.12.3 A nuanced acid test for DoL must be applied to children as under 16s are presumed to lack capacity. The nuanced acid test is therefore whether a person is under the complete supervision and control of those caring for him/her and is not free to leave.

4.12.4 As all children are (or should be) subject to some level of restraint due to their maturity, the question as to whether the child is restricted is determined by comparing the extent of the child's actual freedom with someone of their age, relative maturity, who is free from disability and whose freedom is not limited.

4.12.5 The local authority must first consider whether s.25 of the Children Act 1989 (use of accommodation for restricting liberty) is applicable or appropriate in the circumstances of the individual case. If s25 is not applicable or appropriate, then legal advice should be sought as to whether the care plan requires authorisation by The High Court under Inherent Jurisdiction as permitted by s.100(4) of the Children Act 1989.

4.12.6 See the Law Society's *Deprivation of liberty: a practical guide* (April 2015) and more recent case law for further guidance.

## 4.13. Advocacy and advance decisions

4.13.1 There are a variety of advocates that could help people who lack the capacity to make decisions. These are listed in the table below.

| Type of advocate | Description | CBC's responsibilities |
|---|---|---|
| Independent Mental Capacity Advocate (IMCA) | Where the person has no family or friends that would be appropriate to consult about the decisions. | CBC is responsible for instructing an IMCA to represent a resident who lacks capacity. In these circumstances the Council is called the 'responsible body'. |
| Lasting Power of Attorney (LPA) or Existing Power of Attorney | The LPA will be registered to make decisions on behalf of the person when they are incapacitated. This will be for either property and financial affairs or health and welfare or both. | The Council is responsible for supporting the LPA to make decisions in the person's best interest in regards to the specific matters relating to their LPA during times of incapacity. The council can refer the decision to the Court of Protection when there are serious concerns for the wellbeing of the person. |

| | | |
|---|---|---|
| Relevant Person's Representative (RPR) - DoLS only | This will be a family member or friend of the person that is appropriate to act as advocate during a Standard Deprivation of Liberty Safeguards authorisation. | The Council is responsible for appointing the RPR and ensuring that they are eligible. |
| Paid Person's Representative (PPR) – DoLS only | If the best interests assessor is unable to recommend a RPR, the supervisory body must appoint someone to perform this role in a professional capacity and this person will be a PPR. | The Council is responsible for appointing the PPR and ensuring that they are eligible. |
| Section 39a IMCA - DoLS only | IMCA instructed by the Supervisory Body to be consulted as part of the required DoLS Best Interest Assessment when the person is unbefriended. | The Council is responsible for appointing the Section 39a IMCA when it appears that the relevant person is unbefriended and that any potential Best Interest Assessor would have no one independent to consult as to the best interests of the relevant person. |
| Section 39c IMCA – DoLS only | IMCA instructed by the Supervisory Body to cover the role of the relevant person's representative when there is a gap between appointments. Relevant for DoLS only. | The Council is responsible for appointing the Section 39c IMCA when it appears that there is gap between RPR appointments. For example, there is a potential eligible family member but they are not contactable at the time of granting the standard authorisation. |
| Section 39d IMCA – DoLS only | IMCA instructed by the Supervisory Body to support the relevant person, or their relevant person's representative, when a standard DoLS authorisation is in place. | The Council is responsible for appointing the Section 39d IMCA when it appears that the relevant person themselves or their RPR will benefit from having an IMCA to support them in their situation or role. The relevant person and RPR both have the right to request a 39d IMCA. |
| Deputy | The Court of Protection can appoint a deputy to act for and make decisions for the person if it is not practical or appropriate for the Court of Protection to make a single | The Director of Social Care, Health and Housing may be appointed as the deputy for an adult by the Court of Protection. |

| | | |
|---|---|---|
| | declaration or decision. Deputies are accountable to the Court of Protection. | |
| Litigation friend | People who lack capacity to instruct a solicitor or conduct their own case at the Court of Protection will need a litigation friend. This person could be a relative, friend, attorney or the Official Solicitor (when no-one else is available). The litigation friend is able to instruct the solicitor and conduct the case on behalf of a person who lacks capacity to give instructions. | Where a relative or friend is available but they require a litigation friend, the costs associated with this advocate will not be met by the Council.<br><br>The Council will only pay for the fees of the litigation friend in exceptional circumstances. |
| Appointee | Someone appointed under Social Security Regulations to claim and collect social security benefits or pensions on behalf of a person (18+) who lacks capacity to manage their own benefits. An appointee is permitted to use the money claimed to meet the person's needs. | Where CBC has been made an appointee, we must spend the benefit in the claimant's best interests, inform the benefit office about any change in circumstances, and tell the benefit office if we stop being the appointee e.g., the claimant gains capacity and can manage their own affairs. |

4.13.2 The appointment of an RPR, IMCA of PPR does not absolve the local authority from responsibility for ensuring that the person's human rights are respected. In circumstances where a RPR or IMCA or PPR have failed to take sufficient steps to challenge the decision, the Council must consider bringing the matter before the Court of Protection itself.

4.13.3 Advance decisions to refuse specified treatment can be made by a person who has capacity to do so. This decision will then apply at a future time when that person lacks capacity to consent to, or refuse, the specified treatment.

## 4.14. Disagreements and Disputes

4.14.1 It is in everybody's interests to settle disagreements and disputes quickly and effectively, with minimal stress and cost.

4.14.2 If a decision is challenged, the reasoning behind the decision should be communicated in a clear and transparent way. The member of staff must show they have applied the principles of the MCA and that they have also followed guidance in the Code of Practice to make the decision.

4.14.3 If the person challenging the decision is not satisfied, there are a number of options available to help resolve the matter. These are set out in Chapter 15 of the Code of Practice. Ultimately, if the disagreement cannot be resolved, the person who is

challenging the decision may be able to apply to the Court of Protection. The Council will not fund third party applications to the Court of Protection.

4.14.4 A client or RPR can challenge a deprivation of liberty decision (whether authorised by CBC as the Supervisory Body of Court or Protection) via MCA Section 21a appeal. In these cases, colleagues should contact Legal Services for advice.

4.14.5 If the person is unhappy with how the Mental Capacity Act Policy and related procedures have been applied, they can complain using the Social Care, Health and Housing Customer Feedback Procedure. Disagreement with a decision is not usually grounds for a complaint. The complaints process can consider whether the service has acted with administrative fault. This can include a failure by the service to consider the law; its own policies and procedures or more general examples of poor administrative practice.

## 4.15. Quality assurance

4.15.1 Quality assurance is promoted through a variety of methods. For Adult Social Care:

- the MCA and DoLS Lead Officer is available for practice guidance on areas and situations that prove beyond the knowledge or expertise of line management. Non-emergency advice and guidance can be sought via telephone or email of the MCA and DoLS Lead.
- Formal MCA compliance case file audits are carried out periodically by Lead Officer - Quality Improvement to check that the policy and procedures are being applied consistently and effectively.
- Regular BIA discussion forums and peer supervision sessions are available for internal Best Interest Assessors.
- Thorough spot checks carried out by the MCA/DoLS Lead Officer on a sample of DoLS Best Interests Assessments each month and feedback provided where necessary to promote good practice.
- ASC colleagues will work closely with Children's Service to share good practice and guidance.

## 4.16. Promoting good practice in commissioned services

4.16.1 CBC is responsible for the outcomes of its customers using its commissioned services. The Council will work with the providers of its outsourced services to ensure that appropriate training, processes and policies are in place to protect customers from unauthorised deprivation of liberty.

4.16.2 The responsibility also sits with the Council as a funder of care in community and care home settings to ensure that providers are compliant with the MCA and DoL legislation. Through its commissioning contract monitoring functions the Council will require that policies, training and processes are in place and respond to evidence of poor practice.

4.16.3 All staff have a responsibility to recognise and act on safeguarding concerns including situations where a person may be deprived of their liberty without the appropriate authorisation. If a professional thinks that an authorisation is needed, they should inform the MA in the first instance. This might be as a result of a care review or needs assessment but could happen at any other time too. If the MA subsequently fails to submit a DoLS standard request, and the involved professional

is concerned that an individual may be deprived without authorisation, a third party application should be made by the practitioner.

## 4.17. Customer finance in Social Care Health and Housing

4.17.1 Business Systems in Social Care Health and Housing (SCHH) delivers a variety of products to manage and/or pay for Personal Budgets; this includes Direct Payments, Deferred Payment Agreements and Money Management Accounts.

4.17.2 After liaising with Customer Finance, practitioners must carry out a mental capacity assessment if they doubt that the client has the capacity to make the decision to agree to the terms and conditions of the various products offered. Where it is found that the client lacks the capacity for the decision at that time, Customer Finance staff will liaise with colleagues to ascertain the advocacy and support available so that a best interest decision can be made.

4.17.3 Customer Finance operates a Money Management scheme. Money Management Accounts are set up for customers who have been assessed to be in need of financial support, have been assessed as lacking capacity and it is considered to be in their best interest for their finances to be managed by the local authority. This enables them to continue to live within the community. It is a voluntary agreement and the customer can request control of their finances at any time.

4.17.4 The Appointeeships – Money Management Policy, explains the approach taken when CBC have been appointed a Court of Protection Financial Deputy or have been made an appointee to manage the benefits of a client.

## 4.18. Deprivation of Liberty and Coroners

4.18.1 From the 3 April 2017 Coroners no longer had a duty to undertake an inquest into the death of every person who was subject to an authorisation under the Deprivation of Liberty Safeguards (DoLS)/Mental Capacity Act 2005. This is because ‘a person is not in state detention at any time when he or she is deprived of liberty under section 4A(3) or (5) or 4B of the Mental Capacity Act 2005.’ This was an amendment of ‘state detention’ made via section 178 of the Policing and Crime Act 2017 (Coroners' investigations into deaths) which inserted (2A) to s.48 of the Coroners and Justice Act 2009.

4.18.2 Importantly however, even if an authorisation is in place at the time of a person’s death there may be a requirement for an investigation on other grounds (e.g. that death was unnatural). Furthermore, a person who dies whilst subject to restrictions amounting to “state detention” in a hospital or care home, but without there having been a deprivation of liberty authorisation made under the MCA 2005, an inquest may still be needed. Therefore, care homes and hospitals should still be making such referrals where a death takes place in circumstances amounting to detention, but an authorisation has not yet been.

4.18.3 For further details please refer to the **Guidance No 16A**, entitled "**DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS) – 3rd April 2017 onwards**" and paragraphs 50 to 53 which summarises the current position re DoLs/Coroners Inquests.

https://www.judiciary.uk/wp-content/uploads/2013/10/guidance-no-16a-deprivation-of-liberty-safeguards-3-april-2017-onwards.pdf”

4.18.4 The DoLS team in ASC are the lead contact for the Coroner to confirm whether the deceased person was subject to an authorised DoLS if confirmation is required.

4.18.5 The MCA Practice Guidance explains the action that care homes, nursing homes, hospitals or other care providers, GPs and the Coroner should take when someone subject to a DoLS dies.

## 5. Legal and Regulatory Framework

5.1. The MCA has a number of regulations and Code of Practice attached to it:

- The Mental Capacity, (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008
- The Mental Capacity, (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008
- The Mental Capacity, (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Amendment) Regulations 2008
- Mental Capacity Act Code of Practice
- The Department of Health's Deprivation of Liberty Code of Practice

5.2. In addition to this as the Act is a key piece of legislation for social care services, a range of legislation is also connected, chiefly:

- Health and Social Care Act 2012 Schedule 5
- Human Rights Act 1998
- Equality Act 2010
- Care Act 2014.

## 6. Equality and Diversity

6.1. Central Bedfordshire Council (CBC) is committed to equality and diversity and both embraces and promotes the Equality Duty which requires public bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and people who do not share it.
- Foster good relations between people who share a protected characteristic and people who do not share it.

6.2. This policy will contribute to ensuring that all users and potential users of services and employees are treated fairly and respectfully with regard to the protected characteristics of age, disability, gender, reassignment, marriage or civil partnership, pregnancy and maternity, race, religion, sex and sexual orientation.

## 7. Monitoring and reporting arrangements

7.1. Data on DoLS outputs and outcomes are submitted to the Department of Health annually for the statutory Deprivation of Liberty Safeguards return.

7.2. The proportion of DoLS applications completed and signed off is recorded monthly on the Adult Social Care balanced scorecard which is reported to SCHH Performance Board.

7.3. Team Managers in each of the two Children with Disability Hubs' monitor the number of cases for which DoL applications may need to be considered and track the process for completing DoL assessments.

## 8. Training

8.1. Generic training will be available for Adult Social Care and Children's Services staff to raise awareness of the MCA and Deprivation of Liberty.

8.2. Further training will be available for Adult Social Care and Children's Services staff to understand the practical application of the MCA. This will address how to complete a MCA assessment, make best interest decisions, complete DoLS Best Interest Assessments and apply for court authorisation of a deprivation of liberty for an adult in the community, a young person or a child.

## 9. Responsibilities

9.1. This policy applies to all Central Bedfordshire Council officers who work with customers to make decisions about their care and support and paying for this care and support.

9.2. The accountable officer for all types of deprivation of liberty is the Head of Safeguarding and Quality Improvement in Adult Social Care.

## 10. Evaluation and review

10.1. This policy will be reviewed every three years unless amendments are required before this time as a result of a change in legislation, guidance or case law.

10.2. The Assistant Director of Adult Social Care and Assistant Director of Children's Services Operations have the delegated authority to amend this policy as a result of case law that does not have a substantial impact on existing budgets and resources.