



Overview of Deprivation of Liberty Safeguards

Introduction

The Deprivation of Liberty Safeguards protect people who do not have the mental capacity to consent to care arrangements or treatment.

They apply to people who lack mental capacity who live in a:

- care home
- hospital
- supported living environment

They are an important way to make sure that arrangements to keep people are safe and well looked after and that decisions about any treatment a person in that situation receives is appropriate and in their best interests.

DoLS and the LPS

DoLS were due to be replaced by the Liberty Protection Safeguards in October 2020, as part of the Mental Capacity (Amendment) Act 2019. Due to the impact of the coronavirus (COVID-19), this has been delayed until April 2022.

We will be producing training materials and support for the new system in 2022.

Until then, its important that you continue to work in line with the Deprivation of Liberty Safeguards.

Background

The DoLs were introduced following a very important court case which has become known as 'Bournewood'.

The Bournewood Case - HL v United Kingdom

HL was a 48-year-old man with autism who was unable to speak and his level of understanding was limited. He was living with carers when in July 1997 he self-harmed whilst at a day centre. In response he was taken to Bournewood Hospital without consulting his carers.

When his carers learnt where he was they requested for him to come home and to see him. They were refused both of these requests. It was agreed by all parties that he lacked the capacity to consent to staying in hospital. He was subsequently detained under section 3 of the Mental Health Act 1983 in October 1997.

Background

HL v United Kingdom (ECtHR; (2004) looked at the three month period between being taken to the hospital and detention under the Mental Health Act 1983. The ECtHR found HL had been deprived of his liberty unlawfully, because of a lack of a legal procedure which offered sufficient safeguards against arbitrary detention and speedy access to court.

This was in breach of his rights under the Human Rights Act (arbitrary detention (5(1)) and speedy access to court (5 (4)).

DoLS legislation and regulations

In response to the Bournemouth case the Deprivation of Liberty Safeguards were introduced into Mental Capacity Act 2005 (MCA) through the Mental Health Act 2007. Specifically Schedules IA and AI in the MHA 2007 amend the Mental Capacity Act 2005. The safeguards were implemented from 1st April 2009

The safeguards aim to prevent arbitrary decisions that deprive people of their liberty. These safeguards are to protect people who, if they do need to be deprived of their liberty, have rights of appeal and have a right for the "deprivation" to be reviewed and monitored.

The Deprivation of Liberty Safeguards can only be used if the person will be deprived of their liberty in a care home or hospital. In other settings the Court of Protection can authorise a deprivation of liberty.

Determining if there is a DoLS

DoLS are an important safeguard for people in vulnerable situations whose care and support might involve activities that restrict or deprive them of their liberty.

For a person to be deprived of their liberty the following must apply:

- the objective element - confinement in a particular place for a not negligible length of time
- Subjective element - the person has not consented to it because they lack capacity due to a disorder or disability of the mind
- 'imputable to the state' (which means the State is responsible for detention)

'Not negligible length of time'

There remains uncertainty about what constitutes a 'not negligible length of time' as the objective element in 1) above could be open to interpretation. The Law Society in their "Identifying a deprivation of liberty: a practical guide" suggests that it is unlikely to extend beyond 2-3 days but that this depends on the severity of the deprivation (for instance if someone is locked in a small room or car for even 20 mins, this could be a deprivation of their liberty).

Cheshire West

P v Cheshire West and Chester Council and P & Q v Surrey County Council

In March 2014 the Supreme Court made a decision in three cases that substantially amends the way the Storck requirements should be considered - namely how long is non negligible amount of time? To answer this, the court provides the 'acid test' for defining a deprivation of liberty.

There are two key questions to ask – the 'acid test':

1. Is the person subject to continuous supervision and control?
2. Is the person free to leave?

Cheshire West

The focus is not on the person's ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave. Lady Hale gave further guidance to decision makers using the language of human rights - and stressed that people with disabilities who lack capacity have the same fundamental rights as non disabled people to freedom, choice, expression and liberty. She said:

"If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage"

Factors to consider

There are a number of factors that can be relevant to identify if there is a deprivation of liberty including the following situations:

- Restraint is used, including sedation, to admit a person to an institution where that person is resisting admission
- Staff exercise complete and effective control over the care and movement of a person for a significant period
- Staff exercise control over assessments, treatment, contacts and residence
- A decision has been taken by the institution that the person will not be released into the care of others, or permitted to live elsewhere, unless the staff in the institution consider it appropriate
- A request by carers for a person to be discharged to their care is refused
- The person is unable to maintain social contacts because of restrictions placed on their access to other people
- The person loses autonomy because they are under continuous supervision and control.

Individual circumstances

The ECtHR made it clear that the question of whether someone has been deprived of liberty depends on the particular circumstances of the case. Specifically, the ECtHR said in its October 2004 judgment in *HL v the United Kingdom*:

'to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.'

Individual circumstances

For example, a locked door in itself does not mean someone is deprived of their liberty. It is the degree to which the person is restricted from going out which will help determine whether there is a DOL.

Similarly, a local authority requiring someone to live in a care home against their wishes (when they do not have capacity to make this decision), in itself does not mean that this person will have been deprived of their liberty. Potential associated restrictions, including the location and limited contact with family may add up to a deprivation of liberty.

Restraint or restriction?

The DOLS CoP suggests that it is helpful to envisage a scale, which moves from 'restraint' or 'restriction' to 'deprivation of liberty' (2.3).

Section 6(4) of the Mental Capacity Act 2005 states that 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.

Restraint is appropriate when it is used to prevent harm to the person who lacks capacity and it is a proportionate response to the likelihood and seriousness of harm. The DOLS CoP states that "Appropriate use of restraint falls short of deprivation of liberty" (2.9).

Restraint or restriction?

The DOL CoP goes on to say:

"Preventing a person from leaving a care home or hospital unaccompanied because there is a risk that they would try to cross a road in a dangerous way, for example, is likely to be seen as a proportionate restriction or restraint to prevent the person from coming to harm. That would be unlikely, in itself, to constitute a deprivation of liberty. Similarly, locking a door to guard against immediate harm is unlikely, in itself, to amount to a deprivation of liberty (2. 10)".

The ECtHR has also indicated that the duration of any restrictions is a relevant factor when considering whether or not a person is deprived of their liberty (2.11).

Using restraint when taking someone to a hospital or care home

The DOL CoP says that if a person is resisting transfer to hospital for mental health treatment it may be necessary to use the powers of the MHA 1983. Otherwise, it is unlikely that transporting a person to a hospital or care home would amount to a deprivation of liberty if it is considered that being in that home or hospital will be in the person's best interests.

In exceptional cases e.g. very long journeys, an order may be required from the Court of Protection to ensure the journey is lawful.

When is a restriction a DoL?

It is very difficult to be clear when restrictions add up to a deprivation of liberty. Prior to the implementation of DOLS this was a matter for the courts. Under the DOL safeguards the decision will be taken as part of the assessment process by the best interests assessor.

It will be suggested later, that where restrictions satisfy the person's best interests, IMCAs may consider that the person will have better protection if the restrictions are assessed to amount to a DOL so they can access the DOL safeguards.

When is 'p' deprived of their liberty?

The following are situations where a person may be deprived of their liberty:

The person is required to reside in a hospital or care home against their expressed wishes or those of significant others

This was seen in all the cases included in the DOLS CoP where a deprivation of liberty is found. In HL V UK it was the carers who did not want HL to stay in the hospital, Storck herself was clearly not wanting to stay in the hospital and in JE & DE, both were expressing a desire to live together in the family home.

It is likely that the following situation will be a common trigger for an assessment under the DOLS safeguards:

A person with dementia being moved from their own home to some type of residential care. The rationale for this may be to ensure they get appropriate support (possibly in the most cost effective way). If either the person or family members object to the move, this may constitute a deprivation of liberty.

When is 'p' deprived of their liberty?

There are restrictions on the person's liberty to protect them or other people from harm

If restrictions are presented to be in a person's best interests, it does not mean that they are lawful. Commonly services will lock doors and enforce supervision arguing that this is to reduce risks. This is an area where it can be very difficult for services to work out how best they should support individuals as seen in the following example:

Staff insist that a man with Praeder Willi syndrome only goes out when accompanied. This is because if he goes out alone he will buy and steal food and then eat it. There are increasing health risks associated with his excessive eating which people do not believe he is able to control.

When is 'p' deprived of their liberty?

Poor practice or service deficits

Some people's liberty may be restricted because of poor practice or service deficits as seen in the following example:

A person with dementia living in a care home who has not had the opportunity to go out beyond the grounds of the home for the last ten months. The staff agree this is something he would enjoy but they say they are not funded to provide this type of support.

Whether such restrictions would amount to a deprivation of liberty is unclear. Concerned individuals (including advocates) may challenge the appropriate authorities that they are unlawfully depriving such a person of their liberty.

This is in addition to other routes including complaints procedures.

When is 'p' deprived of their liberty?

Restrictions imposed by family/ friends for people living outside of services

Most people with limited capacity to make decisions are likely to be living with family or friends. In the same way as services, they may impose restrictions on the person which could amount to a deprivation of liberty - which may or may not be in that person's best interests. See the example below:

A family stopping their daughter from attending a day centre which has been offered after she finished school. It is felt by staff who know the woman that she would enjoy this opportunity having spoken to her about it. Her family feels she should stay in the home and will only go out when accompanied by family members.

DOLS cannot be applied to people continuing to living in the family home. If authorities have concerns about the support or treatment of someone living in these circumstances (including whether they are being deprived of their liberty) they should take action to address this, potentially using local safeguarding adult procedures.

The Authorisation Process

If there are concerns that the person is being deprived of their liberty, this needs to be authorised in order for it to be lawful. This relates to actions taken in care homes and hospitals.

There are two types of authorisations:

- Standard
- Urgent.

Standard Authorisation

This is where the managing authority (this is the body who is responsible for the running of the hospital or care home where the person is subject to the deprivation) applies for a standard authorisation in advance of it taking place.

The supervisory body (this is the body who is responsible for considering requests for authorisations, commissioning the required assessments and, where all the assessments agree, authorising the deprivation of liberty and is usually the local authority).

They have up to 21 days from the point of receiving the application to determine whether to authorise the application or not.

The maximum period for standard authorisations is one year.

Urgent Authorisation

In an emergency (ie where it is necessary to deprive someone of their liberty immediately) the managing authority can grant themselves an urgent authorisation.

The maximum length that the managing authority can set for an urgent authorisation is 7 days. However these can be extended by the supervisory body for up to 7 days.

Supervisory bodies must process the accompanying request for a standard authorisation within 7 days or, in exceptional circumstances, 14 if they extend the urgent authorisation. A standard authorisation must then be applied for.

The times for the supervisory body to respond are calendar days (not work days) and are from the point they receive the application for authorisations.

Authorising the application

The authorisation process is made up of six assessments.

1. Age Assessment- this establishes that the person is above 18
2. No refusals assessors - this is a check to ensure there is no existing provision that would overrule the DoLS - such as an advance decision to refuse treatment
3. Mental Capacity - the person must be assessed as lacking the capacity to consent to the move, treatment, placement etc.
4. Mental Health Assessment -this is to establish if the person has a mental disorder. This can only be determined by the mental health assessor s12 doctor
5. Eligibility- this is a check to see if the Mental Health Act should be used instead of the DoLS
6. Best Interests -the BIA needs to judge:
 - a. if a DoL is occurring or is going to occur
 - b. it is in the best interests of the relevant person
 - c. It is necessary for them to be deprived of liberty in order to prevent harm to themselves,
 - d. it is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm.

Authorising the application

If all assessments come back positive the supervisory body must grant an authorisation. They are required to set a maximum duration for the deprivation of liberty of no longer than one year.

They can attach conditions such as frequency of opportunities to go out or the nature of contact with specific people.

They also need to appoint the person's representative.

DoLs in the community

Community deprivations are similar in that the same Storck considerations apply (is the person deprived for a 'not negligible amount of time'; not able to consent and responsible to the State)

The application must be made directly to the Court of Protection not the Local Authority.

If you are supporting a person in the community and you are concerned they may be subject to a DoLS, you should let the LA know who should make the application.

Person's Representative

A fundamental tenet of UK law is the right to participate in decisions made about you and to be represented through decision making. Where a person lacks capacity to consent to activities that may constitute a deprivation of liberty, it is the role of the supervisory body to appoint the person's representative.

This will usually be a family member (or friend) and known as the unpaid Relevant Persons Representative (RPR). If there isn't anyone available to take on the role of unpaid RPR then a paid RPR must be appointed. This role is often provided by advocacy services.

Challenging the DoLS

Advocates may think about making a challenge in the following circumstances:

- you are concerned the person is being unlawfully deprived of their liberty (for instance there is no DoLS authorisation in place)
- you believe the assessments were incorrect
- there has been a change in circumstances (for instance the person may have regained capacity)
- you believe there are alternative ways of safely caring for the person that would avoid a DoL
- you are concerned that conditions attached to the DoL are not being implemented
- you believe the person is unhappy with the arrangements and is objecting
- you believe the person would want to challenge the DoL

How to challenge

There are different options available to the advocate:

Option 1

Raise your concerns directly with the local authority. You can ask for a meeting to discuss your concerns or a best interest meeting. This is good option if you want to raise alternative options

Option 2

Request a Part 8 review

Option 3

Bring an objection under s21A

Part 8 review

The DoLS Code of Practice tells us that 'When a person is deprived of their liberty, the managing authority has a duty to monitor the case on an ongoing basis to see if the person's circumstances change – which may mean they no longer need to be deprived of their liberty'

The statutory grounds for a review are that the relevant person:

- no longer meets the age, no refusals, mental capacity, mental health or best interests requirements
- no longer meets the eligibility requirement because they now object to receiving mental health treatment in hospital and they meet the criteria for an application for admission under section 2 or section 3 of the Mental Health Act 1983 .

Other reasons to hold a review is that there has been a change in their situation and, because of the change, it would be appropriate to amend an existing condition to which the authorisation is subject, delete an existing condition or add a new condition.

Part 8 review

A Part 8 review is not solely there to resolve disputes and should not be used as an alternative to asking the Court of Protection to resolve issues.

But if you are aware of changes in the circumstances then you should consider requesting a Part 8 review.

Lucy Series published a very helpful commentary about the use of Part 8 reviews:

<https://thesmallplaces.wordpress.com/2013/09/26/what-do-part-8-reviews-under-the-dols-actually-do/>

s21A challenges

S21A of the Mental Capacity Act allows for the Court of Protection to decide the lawfulness of a person's detention permitted by a standard authorisation.

Both RPRs and IMCAs can act as a litigation friend for 'p' and initiate s21A proceedings on behalf of 'p'. To do this you will need to talk to a solicitor with expertise in mental capacity law.

s21A challenges

In P v Cheshire West and Chester Council [2014] UKSC 19, the Court was asked to provide guidance on when p should be supported to access the Court of Protection under s.21A of the MCA in cases other than those in which P expresses a clear and consistent objection to the arrangements for his/her care and treatment.

"If it appears to the IMCA that either P or the RPR wish to exercise their relevant rights, the IMCA must assist them to do so. When considering whether it appears that P wishes to exercise their right to challenge their deprivation of liberty the IMCA ought to consider the same factors as the RPR must consider, including both P's stated wishes and behaviour.

s21A challenges

"However, if P is unable to express a wish, either verbally or through their behaviour, then it is not for the IMCA to analyse whether P would wish to exercise their right to challenge, if P had a better understanding of the court process and the purpose of an application. This is solely the role of the RPR. Equally, it is not for the IMCA to consider whether there are any other reasons for P's expressions or behaviour, this is again solely the role of the RPR.

reference:

<https://www.clarkewillmott.com/wp-content/uploads/2017/01/Challenging-Standard-Authorisations-pursuant-to-s21A-Mental-Capacity-Act-2005.pdf>

s21A challenges

In *Re RD* and other (Duties and Powers of Relevant Persons' Representatives and section 39D IMCAs) [2016] EWCOP, Baker J gave some helpful general guidance as to the approach that should be adopted by RPRs and IMCAs in deciding whether to issue proceedings under s.21A.

The first thing you need to consider is whether 'p' has the capacity to ask to issue proceedings. The judge made it clear that this capacity test was different to the test to *conduct* proceedings in that it has a lower threshold.

If 'p' has capacity to ask to issue proceedings and is asking you to, then you should absolutely support them to access the Court of Protection.

s21A challenges

If the person lacks capacity, Baker advises RPRs and IMCAs to ask the next question which is

'is 'p' objecting to the arrangements for his/her care, either verbally or by behaviour, or both, in a way that indicates that he would wish to apply to the Court of Protections if he had the capacity to ask'

So to do this you need to look at the person holistically and understand their views and wishes. You need to consider verbal instructions and statements and take care to work out whether this means they would want to object to the DoLs.

s21A challenges

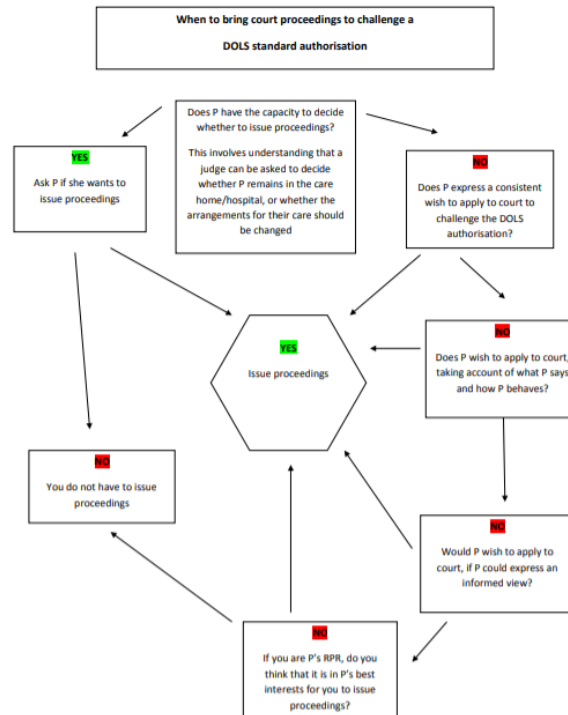
For instance, if someone says 'I want to leave' as the advocate you need to work out if that means leave the room, leave the service, leave the activity or wants to leave living there.

Similarly, if someone is trying to constantly leave the building - for example waiting by the door and leaving by any means possible, is this because they are bored, want to get outside, want to be somewhere or is it because they object to living there (or object to their care arrangements)

s21A Challenges

Mental Capacity Law and Practice has produced a helpful flowchart we recommend you download:

<https://www.mentalcapacitylawandpolicy.org.uk/when-to-bring-an-s21a-application-flowchart/>



References and resources

Deprivation of Liberty Safeguards Code of Practice

<https://www.cqc.org.uk/sites/default/files/Deprivation%20of%20liberty%20safeguards%20code%20of%20practice.pdf>

Summary of DoLs (from SCIE)

<https://www.scie.org.uk/mca/dols/at-a-glance>

The Law Society - Practical Guide to DoLS

<https://www.lawsociety.org.uk/topics/private-client/deprivation-of-liberty-safeguards-a-practical-guide>

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