Mental Capacity Act
&
Deprivation of Liberty Safeguards

Policy Statement

V1.0
# Document Control

### Document details

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## Version history

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## Equality analysis record

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1. Introduction

Purpose
The aim of the Mental Capacity Act (MCA) & Deprivation of Liberty Safeguards (DoLS) Policy statement is to clearly state an agreed approach to the adoption and effective implementation of the MCA and DoLS legislation.

Scope
This policy statement applies to anyone:

- Aged 16 and over who may lack capacity, regardless of disability, diagnosis, physical appearance to make any specific decision due to an impairment or disorder of the mind or brain whether temporary or permanent.
- Currently detained under a secure order (s.25, Children Act, 1989) who may lack capacity to consent to the arrangements for their care and treatment and who is approaching their 18th birthday.
- Aged 18 and over who may be deprived of their liberty and/or:
  - Suffers from a mental disorder (as defined under the Mental Health Act, 1983, 2007)
  - Is cared for in a hospital or care home for the purpose of being given care or treatment.
  - Lacks the capacity to give informed consent to the arrangements made for their care and/or treatment
  - For whom Deprivation of Liberty Safeguards Authorisation is considered, after an independent assessment, to be necessary and the least restrictive option and in their best interests to protect them from harm.
  - Is ordinarily resident in London Borough of Havering.

The Deprivation of Liberty Safeguards does not normally apply to people detained under the Mental Health Act 1983. Where a service user is subject to leave under s.17 (MHA, 1983) or a Guardianship Order and is being deprived of their liberty in an alternative setting (such as a general hospital to enable them to receive care or treatment for a physical condition unrelated to their mental disorder) then health professionals may need to consider applying for a DoLS.

Timescales
This policy is effective in perpetuity, subject to any amendments arising from scheduled reviews. Reviews are scheduled for every two years, although London Borough of Havering and the Havering Safeguarding Adults Board may instruct a review ahead of timescales in light of emerging legislation and case law, or other factors which may alter the policy stance in relation to MCA and DoLS.
Aims, objectives and outcomes

The outcomes this policy statement aims to achieve are:

- Development and implementation of appropriate processes and practices in Havering that ensure that the local authorities, NHS and other health providers and the various commissioned providers meet their statutory duties.

- That no decisions are made for any individual who may lack capacity (aged 16 or over) without their engagement in an assessment of capacity in respect of each individual specific decision, and without that decision being made (where they lack capacity) in their best interests in accordance with the principles of the Mental Capacity Act (2005).

- That no adult (aged 18 or over) is deprived of their liberty unlawfully.

- An agreed approach to the adoption of DoLS that promotes a co-ordinated approach but also allows for flexibility in implementation, to take account of differences in organisational structures and practices between the organisations.

- All assessments and approvals of DoLS Authorisations are carried out in accordance with legally assured local processes, compliant with the Deprivation of Liberty Safeguards Code of Practice.

- An agreed approach to the adoption of DoLS and co-ordinated assessment procedures and processes with all agencies, including CCGs.

- Established and effective working relationships between different services and professional groups that have roles in the DoLS process.

- All key participants in the DoLS process are aware of and perform their roles and statutory responsibilities and have regard to the Deprivation of Liberty Safeguards Code of Practice.

- Implementation of effective strategies and local protocols to prevent deprivation of liberty.
2. Policy

The aim of the LBH Mental Capacity Act (MCA) & Deprivation of Liberty Safeguards (DoLS) policy statement is to clearly state an agreed approach to the adoption and effective implementation of the MCA & DoLS in Havering.

Throughout this document, the Person / Relevant Person is defined as the individual to whom the MCA and DoLS legislation applies.

The Mental Capacity Act (MCA)

The Mental Capacity Act (2005) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with or caring for an adult who may lack capacity must comply with the Mental Capacity Act (2005) and associated codes of practice when making decisions or acting for that person. The purpose of the Act is to set out the guidance, legislation and recommendations required to support service provision as specified with the Act.

The MCA:

- Affects the work of all health and social care staff and organisations involved in the care, treatment or support of people aged 16 years and over who cannot make all or some decisions for themselves. When working in relation to Deprivation of Liberty Safeguards the age limit changes to 18 years and above;
- Is based on good existing practice;
- Creates a single statutory framework for dealing with mental capacity issues and an improved system for resolving disagreements, dealing with personal welfare issues and the property and affairs of people who are not able to make their own decisions;
- Makes it clear who can take decisions, in which situations, and how they should go about this;
- Enables people to plan ahead for a time when they may lose capacity (through advance directives), and
- Has a Code of Practice which explains how the Act will work on a day-to-day basis and provide guidance to all those working with, or caring for, people who lack capacity. Anyone who works with people who lack capacity in a professional or paid role has a legal duty to have regard to the Code of Practice. (An electronic version can be downloaded at [http://www.dh.gov.uk](http://www.dh.gov.uk)).
The Act has five key principles:

- A person must be assumed to have capacity unless it is established that he lacks capacity (S.1(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 (S.1(3)).
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision (S.1(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 (S.1(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 right and freedom of action (S.1(6)).

**Deprivation of Liberty Safeguards (DoLS)**

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 Safeguards arises will depend on the particular circumstances of each situation.

The Deprivation of Liberty Safeguards were incorporated into the Mental Capacity Act in 2009, following the Mental Health Act 2007. The safeguards are designed to prevent unlawful deprivations of liberty and 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.

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

The safeguards provide a framework for authorising DoLS for people who lack the capacity to consent to 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.
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.

The safeguards provide a framework for authorising the DoLS for people who lack the capacity to consent to the arrangements for their treatment or care in either a hospital or care home that, in their own best interests (as defined by the MCA Code of Practice), can only be provided in circumstances that amount to a deprivation of liberty.

The guiding principles of DoLS are:

- All individuals, regardless of age, ability, race, gender, sexual orientation, faith or beliefs should have the greatest possible control over their lives.
- A person aged 16 and over must be assumed to have capacity unless it is assessed that they lack capacity (in relation to a specific decision & in accordance with the Mental Capacity Act, 2005; Code of Practice 2007).
- Irrespective of their capacity, people have a right to express their wishes and priorities and to be personally involved when plans are made for their care. Every effort should be made to enable people to make decisions and express their wishes in a way that is appropriate for them and to maximise their participation in any decision-making process.
- A person must not be treated as unable to make a decision merely because they make an unwise decision.
- Where it has been shown that a person lacks capacity, any act done, or decisions made for or on behalf of that person must be done or made in their best interests. This does not remove the duty to consider the appointment of the Court of Protection Deputy.
- Before an act is done or a decision is made on behalf of a person who has been shown to lack capacity, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is consistent with the person’s rights and freedom of action.
- Every effort must be made, both in commissioning and providing care or treatment, to prevent a Deprivation of Liberty. If a Deprivation of Liberty Safeguards cannot be avoided, it must not occur for any longer than is necessary, must be the least restrictive option and be a proportionate response to the likelihood and seriousness of harm and must be in the best interests of the individual.
What amounts to a deprivation of liberty?
The European Court of Human Rights has identified the following as factors contributing the deprivation of liberty in its judgements on cases to date:

- Restraint was used, including sedation, to admit a person who is resisting;
- Professionals exercised complete and effective control over care and movement for a significant period;
- Professionals exercised control over assessments, treatment, contracts and residence;
- The person would be prevented from leaving if they made a meaningful attempt to do so;
- A request by carers for the person to be discharged to their care was refused;
- The person was unable to maintain social contacts because of restrictions placed on access to other people, and
- The person lost autonomy because they were under continuous supervision and control.

Restraint and the ‘least restrictive option’
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. Appropriate use of restraint falls short of deprivation of liberty.

Restraint covers a wide range of actions, including the use, or threat, of force to do something that the person concerned resists, for example by using cot sides or confining people’s movements or a restriction of his or her liberty of movement (falling short of a restriction that would deprive them of their liberty).

The MCA identifies two additional conditions that must be satisfied in order for protection from liability for restraint to be available:

- You must reasonably believe that it is necessary restrain the person who lacks capacity in order to prevent them coming to harm, and
- Any restraint must be reasonable and in proportion to the potential harm.

Using excessive restraint could leave you liable to a range of civil and criminal penalties. For instance, it may be necessary to accompany someone when going out because they cannot cross roads safely, but it may be unreasonable for you to stop them from going outdoors all together.

However, where the restriction or restraint is frequent, cumulative and ongoing, or if there are other factors present, then care providers should consider whether this has gone beyond permissible restraint, as defined in the Act. If so, then they must either apply for authorisation under the deprivation of liberty safeguards or change their care provision to reduce the level of restraint.
Section 5 of the Mental Capacity Act provides legal protection for people who care for or treat someone who lacks capacity provided that the Act’s principles are followed and that action is taken in the incapacitated person’s best interests.

However, the Mental Capacity Act can only be used to restrain people to the extent that the restraint is:

- necessary to protect the person who lacks a capacity from harm, and
- in proportion to the likelihood and seriousness of that harm.

Section 5 of the Act does not give protection to decision makers for actions that deprive a person of their liberty, unless formal authorisation is obtained.

**Supreme Court judgements and implications**

On 19 March 2014, the Supreme Court handed down its judgment in the case of “P v Cheshire West and Chester Council and another” and “P and Q v Surrey County Council”. The full judgment can be found on the Supreme Court’s website at the following link: [http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf).

The requirement for the Deprivation of Liberty Safeguards is unchanged.

There are still six eligibility requirements that the Person needs to be meet:

1. Aged 18 and over
2. Suffering from a mental disorder
3. Lacking capacity for the decision to be accommodated in the hospital or care home.
4. No decision previously made to refuse treatment or care, or conflict relating to this such as LPA
5. Not ineligible for DoLS
6. Needs to be deprived of liberty in their best interests.

The Supreme Court has now confirmed that to determine whether a Person is objectively deprived of their liberty there are two key questions to ask, which they describe as the ‘acid test’:

1. Is the Person subject to **continuous supervision** and **control**? (both aspects are necessary) **AND**
2. Is the Person free to leave? (The Person may not be saying this or acting on it but the issue is about how staff would react if the Person did try to leave).

**This now means that if a Person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.**
The following factors are no longer relevant to this:
1. the Person’s compliance or lack of objection;
2. the relative normality of the placement, and
3. the reason or purpose behind a particular placement.

The judgment is significant in determining whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.

A deprivation of liberty for such a Person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.

**Deprivation of liberty in “domestic” settings**
The Supreme Court also held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This will include a placement in a supported living placement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements it must be authorised by the Court of Protection.

**Duties under the MCA and DoLS**
All those working within Havering have a duty and commitment to protect vulnerable adults. Where an adult may lack capacity to make a specific decision, a formal assessment of capacity may be necessary to determine capacity. If an adult lacks capacity, specific decisions or actions may need to be taken on their behalf. Such decisions must be made in their best interests and follow the principles laid out in the Mental Capacity Act (2005).

Interagency working is essential if the interests of vulnerable adult are to be safeguarded. The MCA has implications for all aspects of the work with adults who may lack capacity and for all policies.

All agencies within Havering, including the Local Authority, Health agencies (CCGs, acute and community service providers), private hospitals, care homes and nursing homes should identify a named professional lead who will be responsible for ensuring the effective implementation of the Mental Capacity Act and Deprivation of Liberty Safeguards within their respective organisation and their compliance with the LBH MCA & DoLS Policy and Procedures.

All agencies must ensure they provide support for all professionals with responsibilities for assessing capacity through supervision.
All those working with adults who may lack capacity have a duty of care to protect adults who may lack capacity and their participation in inter-agency support is essential if the interests of vulnerable adults are to be safeguarded.

All agencies MUST ensure that all those working with adults (aged 16 and over) who may lack capacity are informed and aware of the MCA and DoLS and comply with the LBH MCA and DoLS Policy and Procedures (although DoLS applies only to people aged 18 and over).

All agencies providing care or treatment for adults who may lack capacity must ensure all staff having contact with service users have received training in MCA and DoLS.

**The duties of the Court of Protection**

The Court of Protection, established by the Mental Capacity Act 2005, exists to allow anybody deprived of their liberty the right to speedy access to a court that can review the lawfulness of their deprivation of liberty.

It is the responsibility of the Managing Authority to ensure that the relevant person and their representative is aware of their rights to apply to the court both before the authorisation is granted and afterwards and that they have the information required in order to make a referral to the Court. The relevant person and their representative should be made aware of the types of questions / issues they can take to the Court as stated in the Code of Practice. The Managing Authority and the Supervisory Body should endeavour to resolve any concerns through mediation, or their own complaints procedures before the relevant person or their representative refer the matter to the Court. The Managing Authority and Supervisory Body are required to comply with any conditions imposed by the Court following a hearing.

**Policy and Process Requirements**

Commissioners and providers of care in Havering are committed to ensuring that any adult who may need to be deprived of their liberty undergoes a comprehensive and timely assessment in accordance with the law and the Deprivation of Liberty Safeguards Code of Practice (2008) and has access to an Independent Mental Capacity Advocate (IMCA), where required, both during the assessment process and where required after a DoLS has been authorised. Where there is no appropriate person to undertake the role of representative, a paid representative should be appointed by the Supervisory Body. Where appropriate this includes a Paid Representative.
Managing Authorities and Supervisory Bodies

Under the Deprivation of Liberty Safeguards, Care Homes and Hospitals (‘Managing Authorities’) have a statutory duty to make formal requests for authorisation to deprive residents or patients of their liberty, when they believe that the care regime is or is likely to amount to a deprivation of liberty.

The application for authorisation must be made to the relevant Local Authority. Before giving an Authorisation for a Deprivation of Liberty, the Supervisory Body (in this case, the Local Authority) must be satisfied that a number of conditions are met, including that the person has a mental disorder as defined in section 1 of the Mental Health Act 1983 and lacks capacity to consent to the arrangements for their care and or treatment.

The Managing Authority must:

- Ensure staff are aware of the new legislation;
- Ensure DoLS is considered upon admission process;
- Adapt their care planning processes to incorporate consideration of capacity to consent to the services and whether their actions are likely to result in a deprivation of liberty;
- Issue an urgent authorisation only in urgent situations;
- Request a standard authorisation only if deprivation of liberty is genuinely necessary – this should always accompany an urgent request;
- Ensure they comply with any conditions attached to the authorisation;
- Obtain authorisation from the supervisory body in advance of the deprivation of liberty, except in circumstances considered to be so urgent that the deprivation of liberty needs to begin immediately;
- Take all reasonable steps to ensure the person or representative understands what authorisation means and how they can apply to The Court Of Protection;
- Monitor whether the relevant Person’s representative maintains regular contact with the person, and
- Monitor the relevant Persons’ circumstances, as any change may require them to request a review.
Identification of Deprivation of Liberty Safeguards Risk

Managing authorities have responsibility for applying to the relevant Supervisory Body for authorisation of Deprivation of Liberty Safeguards for any person who may come within the scope of the Deprivation of Liberty Safeguards.

The Local Authority will support Managing Authorities to develop the requisite knowledge of the safeguards and their statutory responsibilities to enable them to develop and implement appropriate internal procedures to effectively identify possible deprivations of liberty and take appropriate action.

The Local Authority, in partnership with the Managing Authorities will develop and deliver training, guidance and advice for key stakeholders on identifying possible deprivations of liberty and each stakeholder’s role and responsibilities.

Application and Assessment

The Local Authority, in conjunction with key stakeholders, has developed application, assessment processes and practice guidance for standard and urgent Deprivation of Liberty Safeguards authorisations consistent with the DoLS Code of Practice. These are detailed in the MCA & DOLS Procedures.

Authorisations and Reviews

The Local Authority, in conjunction with key stakeholders, has developed authorisation and reviews processes and practice guidance for standard and urgent Deprivation of Liberty Safeguards authorisations consistent with the agreed policy.
Applicability

This policy statement applies to anyone:

- Aged 16 and over who may lack capacity, regardless of disability, diagnosis, physical appearance to make any specific decision due to an impairment or disorder of the mind or brain whether temporary or permanent.

- Currently detained under a secure order (s.25, Children Act, 1989) who may lack capacity to consent to the arrangements for their care and treatment and who is approaching their 18th birthday.

- Aged 18 and over who may be deprived of their liberty and / or:
  - Suffers from a mental disorder (as defined under the Mental Health Act, 1983, 2007);
  - Is cared for in a hospital or care home for the purpose of being given care or treatment;
  - Lacks the capacity to give informed consent to the arrangements made for their care and/or treatment;
  - For whom Deprivation of Liberty Safeguards Authorisation is considered, after an independent assessment, to be necessary and the least restrictive option and in their best interests to protect them from harm, and / or
  - Is ordinarily resident in London Borough of Havering.

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Ownership and authorisation

This Policy is owned by Adult Social Care, in the Children, Adults and Housing directorate.

Under the Council’s Constitution, the Policy is approved through a non-executive decision by the Lead Member for Individuals, following consultation and approval by Havering Safeguarding Adults Board.

3. Related documents

This Policy and its appendices should be read alongside the LBH MCA DoLS Procedures v1.0.
4. Dissemination and communication
This Policy has been disseminated to the Safeguarding Adults Team and Head of Adult Social Care for comment. It is next to be presented to the Havering Safeguarding Adults Board for comment.

It will subsequently be available online via the Havering Safeguarding Adults Board web page: web address TBC.

5. Implementation
This Policy (Mental Capacity Act and Deprivation of Liberty Safeguards) does not have a mandatory training requirement but the following non-mandatory training is recommended for appropriate staff:

- Deprivation of Liberty Safeguards training – contact Adult Social Care Workforce Development Team.
- Best Interest Assessor Training – contact Adult Social Care Workforce Development Team.

6. Monitoring and review
Reviews are scheduled for every two years, although London Borough of Havering and the Havering Safeguarding Adults Board may instruct a review ahead of timescales in light of emerging legislation and case law, or other factors which may alter the policy stance in relation to MCA and DoLS.

Appendix 1: Equality Analysis
To follow.