

## DEPRIVATION OF LIBERTY SAFEGUARDS UNDER THE MENTAL CAPACITY ACT 2005

### Short Fact sheet

#### What are the Deprivation of Liberty Safeguards?

The Deprivation of liberty Safeguards are a framework under the Mental Capacity act 2005 which provide legal protection for people who are, or may become deprived of their liberty within the meaning of Article 5 of the European Convention of Human Rights (ECHR) within a care home or hospital **and** who lack capacity to consent to such arrangements. The safeguards were introduced as a result of the decision in HL v United Kingdom<sup>1</sup> (commonly referred to as the "Bournewood" judgment) which had highlighted breaches of Article 5 in that the deprivation had not been in accordance with a "procedure prescribed by law" and the individual had no means of quickly applying to the court to establish whether his detention had been lawful.

#### What amounts to a Deprivation of Liberty?

There is no simple definition of what amounts to a deprivation of liberty. Practitioners have had to be guided by the Deprivation of Liberty Safeguards Code of Practice<sup>2</sup> and case law including European jurisprudence.

On 19 March 2014 however the Supreme Court delivered its long awaited judgment in the case of P (by his litigation friend the Official Solicitor ) v Cheshire West and Cheshire Council and Anor [2014] UKSC 19 (19 March 2014). This case has provided a new "acid test" for when arrangements made for the care or treatment of an individual lacking capacity to consent to those arrangements amounts to a deprivation of liberty. This test replaces the multifactorial test which had been in operation pre Cheshire. The court has clarified that there **is** a deprivation of liberty for the purposes of Article 5 when:-

1. The person is under continuous supervision and control AND
2. The person is not free to leave.

Both components must be satisfied

Whilst the court has not provided any further guidance on these terms it has clarified that the following factors are NOT relevant for the purposes of deciding whether someone is being deprived of their liberty:-

1. The person's compliance or lack of objection
2. The relative normality of the placement
3. The reason or purpose behind the placement

Where there is doubt as to whether the arrangements amount to a deprivation of liberty the court in the above case (due to the vulnerability of the individuals concerned) stated that "we should err on the side of caution".

#### The authorisation of arrangements which amount to a deprivation of liberty

A person can be deprived of their liberty in a variety of different settings – hospitals, care homes, supported living placements, foster placements (including children over the age of 16), adult supporting

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<sup>1</sup> HL V United Kingdom (2005) 40 EHRR 32

<sup>2</sup> 2008 ISBN 978 0 11 3228157

adults and even within their own home. **ALL** deprivations of liberty which are attributable to the State **must** be authorised. How they are authorised depends on where the deprivation occurs. Where the deprivation occurs in a setting other than a care home or hospital an application to the court will need to be made prior to any deprivation taking place. Where the deprivation occurs in a hospital or care home the deprivation of Liberty Safeguards referred to above will come into play. The rest of this fact sheet is devoted to the latter.

### **Application of the Deprivation of Liberty Safeguards Sched A1 MCA 2005**

Where a "managing authority" (a hospital or care home) forms the view that the arrangements that they are making or are planning to be making for an individual's care or treatment amounts to a deprivation of liberty and the individual cannot consent to those arrangements they have responsibility to apply for an authorisation to the "supervisory body". The supervisory body for Lincolnshire for both care homes and hospitals (and for residents who are placed outside of Lincolnshire but remain ordinarily resident in Lincolnshire) is Lincolnshire County Council. The supervisory body is responsible for considering any requests for authorisation, commissioning the required assessments and authorising any deprivation of liberty.

The Department of Health has produced forms developed for use by managing authorities and supervisory bodies. Whilst these forms do not have statutory basis - they are used because if completed it ensures that all the necessary information required by law is provided.

### **Two different types of authorisation**

There are two different types of authorisation – **an urgent authorisation** and a **standard authorisation**.

An urgent authorisation is given by a managing authority to itself for a maximum of seven days, which may subsequently be extended by the supervisory body by a maximum of a further seven days. The authorisation gives the managing authority lawful authority to deprive the individual of their liberty while the standard authorisation process is undertaken. As the name suggests this is used in urgent circumstances when by its nature there is no time to seek the standard authorisation. When the urgent authorisation has been given by the managing authority they must at the same time submit a request for a standard authorisation.

A standard authorisation is an authorisation given by the supervisory body after completion of the statutory assessment process, giving lawful authority to deprive a relevant person of their liberty in a hospital or care home.

### **What is the process when a request for a standard authorisation has been submitted?**

When the application form has been received by the supervisory body it will assess whether the request is appropriate and seek any further information it requires from the managing authority to help it with the decision. The supervisory body will consider whether the person requires a s.39 Independent Mental Capacity Advocate (IMCA) if the person has no one that can support them in this capacity. The supervisory body will then go on to appoint appropriate assessors to carry out the necessary assessments to find out whether the six qualifying requirements are met.

### **What are the qualifying requirements – the necessary assessments?**

Part 2 of Schedule A1 sets out the qualifying requirements which have to be met before a standard authorisation can be given to provide legal authority to deprive an individual of their liberty. There are six different assessments. The six different assessments do not have to be completed by different assessors.

However there must be a minimum of two assessors and the mental health and best interests assessors must be different.

### **1. Age assessment**

This is simply to confirm whether the person is over 18 as the safeguards only apply to individuals over 18. This assessment can be undertaken by anybody whom the supervisory body is satisfied is eligible to be a best interests assessor.

### **2. No refusals Assessment**

An assessment to establish whether there is any other existing authority for the decision making for the relevant person that would prevent the giving of a standard authorisation. This might include any valid advance decision, or a valid decision by a deputy or donee appointed under a Lasting Power of Attorney. This assessment can be undertaken by anybody whom the supervisory body is satisfied is eligible to be a best interests assessor.

### **3. The Mental Capacity Assessment**

The purpose of the mental capacity assessment is to establish whether the relevant person lacks capacity to decide whether or not they should be accommodated in the relevant hospital or care home to be given care or treatment. It is capacity to make this specific decision at the time it needs to be made. Supervisory bodies may wish to consider using an eligible assessor who may know this individual if they think it would be of benefit.

### **4. The Mental Health Assessment**

This assessment is to establish whether the relevant person has a mental disorder within the meaning of the Mental Health Act 1983. This therefore means any disorder or disability of the mind. Dependence of alcohol or drugs is not considered to be a mental disorder for the purposes of the 1983 Act. It will however include a person with a learning disability whether or not the disability is associated with abnormally aggressive or seriously irresponsible conduct. The mental health assessment must be carried out by a doctor and the assessing doctor has to either be approved under s. 12 of the Mental Health Act 1983 or be a registered medical practitioner with at least three years post registration experience in the diagnosis or treatment of mental disorder such as GP with a special interest. The mental health and best interests assessments cannot be carried out by the same person.

### **5. Eligibility Assessment**

This is an assessment to establish whether or not a person is rendered ineligible (circumstances set out in Sch 1A (para 17) for a standard deprivation of liberty authorisation because the authorisation would conflict with the requirements that are, or could be, placed on the person under the Mental Health Act 1983. In order to carry out an eligibility assessment the person must be a mental health assessor who is also a section 12 doctor or a best interests assessor who is also an approved mental health professional (AMHP).

### **6. Best interests Assessment**

The purpose of this assessment is to establish firstly, whether the person is being or about to be deprived of their liberty and if they are they must then consider whether:

- a) It is in the best interests of the person to be deprived of their liberty
- b) It is necessary for them to be deprived in order to prevent harm to themselves

- c) The deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm.

The best interests assessment must be undertaken by an AMHP, social worker, nurse, occupational therapist or chartered psychologist with the skills and experience specified in the regulations.<sup>3</sup> The best interests assessor can make recommendations as to whether or not there should be any conditions attached to the authorisation and must specify what the maximum authorisation period should be. This must not exceed 12 months.

**What happens once all the assessments have been completed?**

The supervisory body will consider all the assessments and if the assessments conclude that the relevant person meets all the qualifying requirements it will grant the authorisation. If any of the assessments are negative then the assessment process should stop and the authorisation will not be given. If all the qualifying requirements are met the supervisory body will set the period (which must not be longer than that recommended by the BIA). It will also consider whether any conditions should be added to the authorisation after considering any recommendations made by the BIA. The supervisory body will also provide copies of the authorisation to certain specified individuals and the managing authority and appoint a representative for the relevant person.

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<sup>3</sup> The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008.