27 RESTRAINT AND DEPRIVATION OF LIBERTY SAFEGUARDS

27.1 Introduction

This guidance outlines the process for care managers to follow when planning and reviewing care home placements for service users who may lack capacity to consent to the placement. This includes respite placements. The Deprivation of Liberty Safeguards form a part of the Mental Capacity Act. All work with adults who may lack capacity to make a decision must follow the provisions of the Mental Capacity Act and the Code of Practice. See Section 24 on Consent and Capacity.

For decision-making tools, see “Deprivation of Liberty Safeguards – Guidance for Staff”. See Section 27.13 for a flow-chart summary of this process.

For details of the steps on ASCC, see ASCC Guidance Sheet 22 [PDF] (file size: 65Kb)

27.2 Capacity assessment

There may be doubt about the person’s capacity to decide whether to consent to the proposed care home placement.

In approaching capacity, care managers must bear in mind the first three principles of the Mental Capacity Act:

- assume the person has got capacity to make their own decision
- provide the person with all possible support to help them to make their own decision if possible (using Chapter 3 of the Mental Capacity Act Code of Practice)
- if the person is making an unwise choice, this does not mean that they lack capacity to make the decision.

If the person is struggling to make their own decision, it is the care manager’s role to carry out the capacity assessment about whether the person can decide to move to the care home (temporarily or permanently). The person may want the support of a family member, friend or another professional during the capacity assessment. Seek information from other involved people as to their opinion on capacity. However, you need to be satisfied that the person does or does not have capacity to consent to the care home placement.
Record your assessment and your reasons for it on the FACE capacity assessment form.

The person lacks capacity to make the decision if currently their mind is not working as it should be (due to a temporary, fluctuating or permanent problem); and cannot do one or more of the following:

- understand the information relevant to the decision
- retain this information long enough to use it
- use or weigh up this information in order to come to a decision; or
- communicate their decision.

- Information relevant to the decision: the care manager will need to be very clear what this information is. This will include precisely what the decision is. You need to be able to identify, for each possible alternative, what the benefits and risks are to this individual service user and be able to explain them in the most appropriate way for that service user. The service user may already know some of this information but it is likely that you will need to explain a lot of the information to them. The ability of the service user to explain back to you, or to paraphrase the key points at issue will be helpful in working out whether the service user understands the relevant information.

- Retaining the information: the service user needs to be able to remember all the key pieces of information at once in order to be able to use them to make their decision. If they do not know the information before you explain it to them, or cannot remember the conversation afterwards, this does not affect their ability to make the decision on the basis of the information they have been given during the assessment.

- Using or weighing up the information: there might be something stopping the service user being able to weigh up the relevant information; for example, paranoia. However, if the service user can use or weigh up the information against their own value-base, they will be able to fulfil this part of the assessment, even if others disagree with their priorities.

- Communicate the decision: the Code of Practice makes it clear that, if someone has any means of communication, they will be able to fulfil this part of the assessment.

See Chapter 4 of the Mental Capacity Act Code of Practice for more information on assessing capacity.

If the service user does have capacity to decide on the care home placement, they must choose between the available options. For example, they can choose to face more risk through staying at home with a care package which you think does not fully meet their needs, rather than accepting the offer of 24-hour care in a care home. If the service user has capacity to make this decision and does decide they would like to move to or accept respite at the care home, you need to apply to the relevant panel.

Just because the service user agrees with your decision or that of the care team, does not necessarily mean that they have capacity to make that decision.
27.3 Best interests decision

If the person lacks capacity to decide to consent to the proposed care home placement, a best interests decision needs to be made on their behalf.

Check on ASCC Mental Capacity Information form whether the person has an attorney or deputy whose decision-making powers include deciding where the person lives (see Section 26). If a family member or friend tells you that they are attorney or deputy over the person’s personal welfare decisions, ask the attorney or deputy to show you their official documentation. An attorney should have a Lasting Power of Attorney (LPA) form stamped on each page by the Office of the Public Guardian. The LPA will list any restrictions on their decision-making powers. A deputy should have a deputyship order, stamped by the Office of the Public Guardian, which will list the decision-making powers the deputy has been given. If they cannot produce their form, check with the Office of the Public Guardian (unless the decision cannot be delayed) by completing the form available either on the mental capacity section of the DirectGov website or the Ministry of Justice website. No fee will be payable. See Section 27.6 if there is an attorney or deputy involved.

If there is no attorney or deputy with the power to decide where the person lives or stays, the care manager needs to make the decision in the person’s best interests (with agreement from the relevant panel). Record your decision and the reasons for it on the FACE capacity assessment form and attach to the Mental Capacity Information form in ASCC.

See Section 25 for ‘Principles to follow’ and ‘Steps to take’ in Best Interests decisions.

27.4 Care planning – consideration of restraint

The care manager needs to consider, as part of the care planning and risk assessment process, whether it is likely there will need to be any type of restraint used.

Restraint is either:

- using, or threatening to use, force to make someone do something they are resisting, or
- restricting the person’s freedom of movement, whether they are resisting or not.

For each type of restraint being considered:

- is it likely the person will lack capacity to decide about the matter in question?
- is the proposed action in the person’s best interests?
- is the proposed restraint in order to prevent harm to the person themselves?
- is the proposed restraint proportionate to the likelihood of the harm occurring and the seriousness of the harm if it did occur?
• is the proposed restraint necessary or is there a less restrictive way of keeping the person safe?

More guidance can be found in 6.40-6.48 of the Mental Capacity Act Code of Practice.

If the person is objecting to moving to the care home, consider discussing with the Adult Mental Health Practitioner (AMHP) Service whether use of the Mental Health Act would be appropriate. See Section 27.5.

27.5 Use of the Mental Health Act

If the person is objecting to moving to the care home, the use of guardianship may be appropriate. The person would need to be suffering from a mental disorder as defined by the Mental Health Act 1983. If they have a learning disability, they would need to be considered as exhibiting abnormally aggressive or seriously irresponsible conduct.

The person would need to have a Mental Health Act assessment to be considered for guardianship. If the Approved Mental Health Practitioner (AMHP) and approved doctors view guardianship as appropriate, the AMHP will put in the application to the Executive Director of Housing, Health and Adult Social Care who would then become the person’s guardian.

Amongst other powers, the guardian can specify where the person should live and has the power to transport the person to that place and return them if they leave (but not stop them from leaving). Guardianship therefore does not permit a person to be deprived of their liberty in the place where they are required to reside. In practice, the exercise of the functions of the guardian is delegated to the care manager.

This may be a good option if the person would respond well to this type of legal authority, and when it needs to be seen whether the person will settle in the new accommodation in the short to medium term.

27.6 Attorney or deputy involved

This part of the guidance applies if the person has an attorney or deputy whose powers include deciding where the person lives or stays.

When you have assessed that the person lacks capacity to consent to the proposed care home placement, ask the attorney or deputy to decide between the available options. The attorney or deputy must follow all the principles of the Mental Capacity Act, including being sure that all possible support has been provided to the service user to enable them to make their own decision if possible. The attorney or deputy must be satisfied that the service user lacks capacity to make this decision themselves before they can make it for them, as they are only able to make any welfare decision if the person lacks capacity to make it themselves.

The attorney or deputy will need to follow the best interests process laid out in the Mental Capacity Act, in a similar way to if the care manager were making the best interests decision. It is not simply what they think is best for the service user but they must take the service user’s views into account and the views of others, including the care manager (see Section 27.3 above for more details). The attorney or deputy should be
able to explain how they have followed the Mental Capacity Act and its Code of Practice in reaching their decision.

If the attorney or deputy does not agree to the care home placement or to the type of care plan being proposed, you cannot go ahead with the placement. If you assess that the person will be left at an unacceptably high level of risk and therefore that the attorney or deputy does not appear to be acting in their best interests, you should raise a Safeguarding alert (see Section 31). The Safeguarding response might include making an application to the Court of Protection for a best interests decision.

27.7 Consideration of deprivation of liberty

If the care plan includes restraint, you will need to consider whether or not the care will amount to deprivation of liberty. Not all restraint will amount to deprivation of liberty. It can be useful to consider a continuum of restraint and deprivation of liberty. There may be some types of restraint that are so restrictive that they alone constitute deprivation of liberty. In other cases, the cumulative effect of different types of restraint may constitute deprivation of liberty.

Chapter 2 of the Deprivation of Liberty Safeguards (DoLS) Code of Practice goes into detail about what to consider when deciding whether the care amounts to deprivation of liberty. It includes (at 2.6) this list of what to consider:

- all the circumstances of each and every case

- what measures are being taken in relation to the individual? When are they required? For what period do they endure? What are the effects of any restraints or restrictions on the individual? Why are they necessary? What aim do they seek to meet?

- what are the views of the relevant person, their family or carers? Do any of them object to the measures?

- how are any restraints or restrictions implemented? Do any of the constraints on the individual’s personal freedom go beyond ‘restraint’ or ‘restriction’ to the extent that they constitute deprivation of liberty?

- are there any less restrictive options for delivering care or treatment that avoid deprivation of liberty altogether?

- does the cumulative effect of all the restrictions imposed on the person amount to a deprivation of liberty, even if individually they would not?

You may want to use the decision-support tool. If in doubt seek guidance from your manager or the MCA Lead Practitioner.

If you conclude that the proposed care arrangements do not amount to deprivation of liberty, apply to the relevant panel for authorisation of the placement. Once the panel has agreed an appropriate level of care, discuss the likely restraint with the proposed care home manager (unless there is an attorney or deputy who is making the arrangements themselves). It is the care home manager’s legal duty to request a DoLS
authorisation if they think this is necessary. However it is likely that your discussion will help them to consider whether they can provide the appropriate care and support without depriving the person of their liberty, or whether an authorisation request is necessary.

27.8 Deprivation of liberty likely to be necessary

The Deprivation of Liberty Safeguards only apply in hospitals and registered care homes. If the proposed placement is likely to deprive the person of their liberty but is not in a registered care home, the relevant panel will need to consider whether an application to the Court of Protection is necessary or whether there is any way in which care can be provided to avoid deprivation of liberty.

If the proposed placement (long-term or short-term) is in a registered care home, the relevant panel will need to decide on what is appropriate provision to meet the person’s assessed needs. This should involve consideration of whether there is any way of meeting their needs which would avoid depriving them of their liberty. If the panel feel that the likely deprivation of liberty is necessary, then they will need to decide on an appropriate type of placement and appropriate funding level.

Once the relevant panel has agreed to a care home placement, the care manager will need to identify an appropriate care home. Discuss with the care home manager your own assessment that it is likely to be necessary and appropriate for the care plan to involve deprivation of liberty.

If no placement can be found at the agreed fee level, the relevant panel will need to review the care plan and funding level and agree on the appropriate next step.

If the care home manager assesses that they can meet the person’s needs and is able to offer them a place within the fee level agreed by the panel, it is the care home manager’s legal duty to request an authorisation from the Local Authority (the Royal Borough as the person will be ordinarily resident here) if they think that the care they will be providing will amount to deprivation of liberty.

If the care home manager does not think that the care they will be providing will amount to deprivation of liberty and therefore does not intend to request an authorisation, the care manager needs to feed this back to the MCA Lead Practitioner so that they can discuss this with the care home manager. The MCA Lead Practitioner will feed back to the care manager. If no authorisation is to be applied for, you can go ahead with making the arrangements for the placement.

If the care home manager is planning to request an authorisation, the person should not be moved until the DoLS assessments have been completed, unless the person needs to move urgently to avoid risk of major harm (in which case the care home manager will issue an urgent authorisation once the person has moved in order to deprive them of their liberty until the DoLS assessments have been completed). Inform the DoLS Administrator that the care home manager is planning to request an authorisation so that they can expect the request. Also inform anyone who urgently needs to know that DoLS assessments are to be carried out, for example, the hospital discharge team.

The DoLS Administrator will let you know who will be carrying out the assessments and the date by which the assessments need to be completed. The care home manager will have informed close family or friends...
that they have made a referral. The Best Interests Assessor will consult you as part of the assessment process. The DoLS Administrator will feedback the result of the assessments to both the care home manager and to you.

27.9 DoLS authorisation given

If the authorisation has been given, there may be some conditions attached. These will relate to the deprivation of liberty. The conditions will normally have been recommended by the Best Interests Assessor. For example, the Best Interests Assessor may have assessed that deprivation of liberty is in the person’s best interests but that the current proposed care plan is too restrictive. They may have recommended a condition relating to the person’s cultural or social needs. They may also have recommended that changes can be made to the person’s care plan over the course of the authorisation to avoid deprivation of liberty in future.

Once the senior manager has signed off the authorisation, any conditions attached are mandatory for the care home to follow. The Best Interests Assessor will already have discussed the proposed conditions with the care home manager. You need to revise the care plan to incorporate the conditions. If the care home manager is asking for an increase in fees to implement the conditions, you may need to refer back to the relevant panel. If the panel considers that another placement could be found at lower cost, they need to bear in mind that the new care home would need to apply for another authorisation.

27.10 DoLS authorisation not given

If the proposed care has been assessed as not amounting to deprivation of liberty, then you can go ahead with making arrangements for the placement.

If the proposed care does amount to deprivation of liberty but the authorisation has not been given, the care plan must be amended to avoid deprivation of liberty. Refer back to the relevant panel for a decision on how care can be commissioned in circumstances that do not amount to deprivation of liberty. This may involve increased resources.

Produce and implement a revised care plan, following the best interests process (see Section 25). If the person is already a resident in the care home, the care home will need to implement a less restrictive care plan. If there are any unreasonable delays on this, open a Safeguarding alert (see Section 31) and inform the MCA Lead Practitioner, who will inform the Care Quality Commission.

27.11 Placement review

The team manager will need to set the review frequency. This is recommended to be not less than six-monthly (following the initial review).

The care manager should review the restraints as part of their review process, including whether there are now any less restrictive options that would be in the person’s best interests. If there are any changes in circumstances, for example, if the care regime is unlikely to now amount to deprivation of liberty, discuss this with the care home manager and ask them to consider requesting a review. The DoLS Team would then consider the change in circumstances and request DoLS review assessments if appropriate. The assessor is likely to consult with you as part of their review.
As part of your review, consider whether any conditions attached to the authorisation have been implemented by the care home.

Every resident for whom there is an authorisation in place will have a representative, either a family member or friend who is able to keep in regular contact, or a paid representative. The representative’s role is to support the resident on DoLS, including raising issues of concern with the care home and requesting a review. Unpaid representatives can have support from an IMCA. Discuss with the care home as part of your review the visits from the representative and whether these are frequent enough to adequately support the person.

When the authorisation is near its expiry date, there is no automatic review. The care home manager would need to request a new authorisation to start when the current one expires. A full set of DoLS assessments would then be carried out again. If the review is taking place within two months of the expiry of the authorisation, the care manager should discuss with the care home whether another authorisation will need to be requested to start when the current authorisation finishes.

Record the above information on your review documentation.

Contact the DoLS Administrator to let them know that you have completed a review and where the review is recorded and provide a copy if the review is not recorded on ASCC (the DoLS Administrator has access to ASCC). The MCA Lead Practitioner will consider any DoLS issues recorded on the review documentation and liaise with you and care home manager as appropriate.

27.12 Placement review (no DoLS authorisation in place)

The care manager/reviewing officer should review any restraints as part of the review process, including whether there are now any less restrictive options that would be in the person’s best interests. If you feel that the care now amounts to deprivation of liberty or is likely to in the near future, discuss this with the care home manager and aim to reach agreement on whether the care home manager needs to request an authorisation.

If the care home manager comes to the conclusion that deprivation of liberty is not occurring but you disagree, feed this back to the DoLS Service and consider requesting an assessment of whether an unauthorised deprivation of liberty is occurring.