

Deprivation of Liberty - addendum to the Mental Capacity Act

Introduction

Introduced into the Mental Capacity Act 2005 (MCA) through the Mental Health Act 2007, the safeguards are to prevent arbitrary decisions being made that deprive vulnerable people of their liberty.

Sometimes we have to place restrictions on people for their own safety. There are different levels of restriction ranging for example from a locked door to physical restraint. At some point the degree and intensity of these restrictions become what is legally known as a deprivation of liberty.

Deprivation of liberty legislation arises from the “Bournewood” case which was heard by ECtHR (European Court of Human Rights). The case decided that where a person is deprived of their liberty without any legal authority then it is a breach of Article 5 of the European Convention of Human Rights:

“No one should be deprived on their liberty unless it is prescribed by law”

Therefore, when a person needs to be deprived of their liberty there must be safeguards in place that will ensure that:

- it is in the person’s best interests;
- They have representatives and rights of appeal; and the deprivation of liberty is regularly reviewed and monitored.

The Safeguards cover people in both **hospitals** and **care homes** registered under the Care Standards Act 2000. They will become a statutory obligation on 1st April 2009.

What is a deprivation of liberty?

There is no clear definition and it is defined in case law. In the Bournewood case it was about restraints placed upon HL within the hospital: where he could go, what he could do, access to visitors and not being free to leave. Subsequent case law e.g. DE and JE v Surrey County Council deemed a deprivation of liberty had arisen from refusals of requests for “discharge”.

Identifying a deprivation of liberty

Remember a person must lack capacity as defined in the Mental Capacity Act and be considered in need of a deprivation of liberty authorisation.

locked door or an attempt to occasionally try and open it is not in itself a deprivation of liberty, but if the person is persistently trying and expressing distress and anger at not being able to leave a deprivation of liberty assessment would be required. Each situation must be looked at individually taking into account degree and intensity and level of compliance of the person who lacks capacity.

Not by themselves likely to be a deprivation of liberty

- Locked ward
- Keypad / double door handles
- Bringing back the patient who has wandered
- Reasonable persuasion being used to take a confused person to hospital

- Placing reasonable limitations on visitation rights
- Refusing to let the patient leave without an escort whose job is to support them

Likely to be a deprivation of liberty

- Force being used to convey (transport) a resisting person to hospital
- Force being used to prevent a person leaving hospital where they persistently try to leave
- Severely restricting access to the patient by relatives & carers
- Decision to admit being opposed by relatives / carers who live with the patient
- Denying a request by relatives to have the person discharged to their care
- Severely restricting movement within the setting or access to the wider community

When should a deprivation of liberty authorisation be used and what does it look like?

Anyone can request a deprivation of liberty assessment but in general it will be the role of the **Managing Authority** (care home or hospital) to alert the **Supervisory Body** (the local authority or PCT) who instruct and authorise assessments from a **Best Interests Assessor** and **section 12 doctors**.

A deprivation of liberty authorisation can last up to one year and should be reviewed regularly. Everyone on a DOL authorisation will have a **representative**, either a family member or if no one is appropriate for the role, a paid representative will be appointed.

Independent Mental Capacity Advocates (**IMCAs**) will represent a person being assessed by a best interests assessor if they have no friends and family to represent them. An IMCA will also be available to provide support to family or friends acting as representatives.