Deprivation of Liberty Guidance (DoLS)

1. INTRODUCTION

1.1 This guidance is underpinned by the implementation of the Mental Capacity Act 2005 (MCA) within the care setting. It sets out the main features of the MCA, identifies the duty placed on Hartlepool Borough Council (HBC) staff and constitutes the basis for the procedures derived from the MCA Code of Practice (2005), the Deprivation of Liberty Safeguards Code of Practice (2008) (DoLS) and relevant case law. This guidance applies to HBC staff that work with or provide care for people who lack the mental capacity to make specific decisions for themselves at a specific point in time.

1.2 The MCA came into effect April 2007. An addendum to the main Act, the DoLS came into force from August 2008. The MCA provides a statutory framework to empower and protect any adult over the age of 16 who may not be able to make their own decisions. The MCA assumes people have capacity unless it is established otherwise.

1.3 If it is considered that a person may lack capacity, this should be appropriately assessed with reference to the Acid Test outlined in the MCA. If, following assessment, it is confirmed that a person lacks capacity in relation to a particular decision, the MCA provides the legal framework to authorise the least restrictive care regimes in a person's best interests. This guidance outlines the Acid Test and the factors which are relevant to determine what is in the person's best interest.

1.4 In March 2014 the Supreme Court confirmed the case of P V Cheshire West and Chester Council and another; P and Q v Surrey County Council [2014] UKSC 19 that a person who lacks capacity will be deprived of their liberty if they satisfy the Acid Test. this means that an person who lacks capacity will be deprived of their liberty if they:

- Are subject to continuous supervision and control; and
- Are not free to leave.

1.5 If both elements of the Acid Test (above) are satisfied then the deprivation of liberty legally requires authorisation. This guidance sets out more information as to when the Acid Test will be satisfied and what processes are required in order to legally authorise the deprivation of liberty.

2. SCOPE

2.1 This guidance does not replace the MCA – DoLS Code of Practice or seek to repeat the content or guidance contained within it. This guidance and associated procedure gives direction and guidance for all staff who work with people who are currently deprived of their liberty of have the potential to be deprived of their liberty in the future.

3. RELEVANT LEGISLATION AND DOCUMENTS

- Care Act 2014;
- Mental Capacity Act 2005;

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- The Mental Capacity, (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 (effective from 3.11.08);

- The Mental Capacity, (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 (effective from 3.11.08);
- The Mental Capacity, (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Amendment) Regulations 2008 (effective from 3.11.08);
- Health and Social Care Act 2012;
- Deprivation of Liberty Code of Practice. Department of Health. August 2008;

4. RESPONSIBILITIES

4.1 HBC is the Supervisory Body[1] which will receive requests from Managing Authorities[2] and is required to respond to requests for authorisations within the mandated deadlines under the DoLS regulations. Only HBC can authorise DoLS requests for a person who has ordinary residence in the Hartlepool area.

4.2 Managing Authorities in Hartlepool must apply to HBC for DoLS authorisations if they believe that a person in their care (aged 18 years or over) lacks capacity and the care or treatment they provide to that person is likely to deprive the person of their liberty.

4.3 All staff will have responsibilities under this guidance if they are involved in the assessment, care, treatment or support of people who:

- Are currently detained under a secure order (s25 Children Act, 1989) who may lack capacity to consent to the arrangements for their care and/or treatment and who is approaching their 18th birthday; may lack capacity to consent to care and/or treatment;
- Are aged 18 and over and satisfy the requirements of the Acid Test (even if living in the community);
- Suffer from a mental disorder within the meaning of the Mental Health Act 1983, 2007 (disregarding any exclusion for persons with Learning Disability);
- Is cared for in a hospital or care home (registered under the Care Standards Act 2000) for the purpose of being given care and/or treatment;
- Are aged 18 and lack the capacity to give informed consent to the arrangements made for their care and/or treatment and satisfy the requirements of the Acid Test (even if living in the community);
- Are ordinary resident of Hartlepool;
- Are NOT detained under the Mental Health Act 1983, 2007;
- Deprivation of Liberty is considered to be a proportionate response, in their best interests and least restrictive means of protecting them from harm.

4.4 There are more specific responsibilities for the Early Intervention Team, MCA/DoLS Manager, Best Interest Assessors and Head of Service regarding the receipt of DoLS forms

[1] Supervisory Body: A primary care trust or local authority that is responsible for considering a deprivation of liberty request received from a managing authority, commissioning the statutory assessments and, where all the assessments agree, authorising deprivation of liberty.
[2] Managing Authority: the person or body with management responsibility for the hospital or care home in which a person is, or may become, deprived of their liberty.

from the Managing Authority and the Assessment and decision-making regarding potential DoLS. These roles and responsibilities are included in detail in the MCA – Deprivation of Liberty Safeguards Procedure.

5. WHAT IS DEPRIVATION OF LIBERTY?

5.1 The Cheshire West ruling has provided a definition of what is meant by the term 'deprivation of liberty'. A deprivation of liberty occurs when 'the person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements'.

5.2 In practice this means some people deemed to be deprived of their liberty under the tests used before the judgement would still be found to be so now, while the status of other people would change before and after the judgement. In practical terms, many more people will be found to be deprived of their liberty.

5.3 Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'. The Deprivation of Liberty Safeguards is the procedure prescribed in law when it is necessary to deprive a person of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

6. RESTRAINTS AND RESTRICTIONS

6.1 Section 6(4) of the MCA states that someone is using restraint if they:

- Use force – or threaten to use force to make someone do something they are resisting; or
- Restrict a person's freedom of movement, whether they are resisting or not.

6.2 The MCA allows restrictions and restraint to be used in a person's support, but only if they are in the best interests of a person who lacks capacity to make the decision themselves. Restrictions and restraint must be proportionate to the harm the care giver is seeking to prevent, and can include:

- Using locks or key pads which stop an person going out or into different areas of a building;
- The use of some medication, for example, to calm;
- Close supervision in the home, or the use of isolation;
- Requiring a person to be supervised when out;
- Restricting contact with friends, family and acquaintances, if they could cause the person harm;
- Physically stopping an person from doing something which could cause them harm;
- Removing items from an person which could cause them harm;
- Holding an person so that they can be given care, support or treatment;
- Bedrails, wheelchair straps, restraints in a vehicle, and splints;
- The person having to stay somewhere against their wishes or the wishes of a family member;

- Repeatedly saying to a person they will be restrained if they persist with certain behaviour.

6.3 Such restrictions or restraint can take away a person's freedom and so deprive them of their liberty. The above should be considered whilst deliberating whether the support offered to a person is the least restrictive way of providing that support.

6.4 Staff must be aware of what is and is not a deprivation of liberty. They should be able to identify when a person might be deprived of their liberty and take action. When developing a care/support plan of persons who are unable to consent to their care, they should consider whether any restrictions or restraint being proposed in the best interests of the person amount to a deprivation of liberty.

6.5 Staff should only use restraint on a person who lacks capacity if the following conditions are met:

- The person taking action must reasonably believe that restraint is necessary to prevent harm to the person who lacks capacity; and
- The amount or type of restraint used and the amount of time it lasts must be a proportionate response to the likelihood of serious harm.

6.6 Staff must use the Acid Test to determine whether frequent and ongoing restraints and restrictions are subject to the DoLS process.

7. HOW IS DEPRIVATION OF LIBERTY AUTHORISED UNDER DoLS?

7.1 Although a person can be deprived of their liberty in any setting, previously the Deprivation of Liberty Safeguards (DoLS) only applied to persons in a care home, hospital or supported living. This includes where there are plans to move a person where they may be deprived of their liberty. However, the Acid Test is now incorporated into the new social work process to ensure compliance with the MCA and highlight where people are being deprived of their liberty in the community.

7.2 The Acid Test is incorporated into all new social work documentation to ensure that the least restrictive care regimes are in place and proportionate with risk. If DoLS is the least restrictive option staff should seek advice from their Team Manager and the Legal department and should consider an application to the Court of Protection.

7.3 Where a managing authority thinks it needs to deprive someone of their liberty they have to ask for this to be authorised by the local authority. This can be done up to 28 days in advance of when they plan to deprive the person of their liberty.

7.4 Once the managing authority has completed the form requesting a standard authorisation the local authority had 21 days to decide whether the person can be deprived of their liberty.

7.5 A best interest assessor must be appointed to consider whether or not the below conditions have been met to allow the person to be deprived of their liberty under the safeguards. They include:

- The person is 18 or over (different safeguards apply for children).

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- The person is suffering from a mental disorder.
- The person lacks capacity to decide for themselves about the restrictions which are proposed so they can receive the necessary care and treatment.
- The restrictions would deprive the person of their liberty.
- The proposed restrictions would be in the person's best interests.
- Whether or not the person should instead be considered for detention under the Mental Health Act.
- There is no valid advance decision to refuse treatment or support that would be overridden by any DoLS process.

7.6 If any of the conditions are not met, deprivation of liberty cannot be authorised. If all conditions are met, HBC must authorise the deprivation of liberty and inform the person and managing authority in writing. It can be authorised for up to one year.

7.7 The person does not have to be deprived of their liberty for the duration of the authorisation. **The restrictions should stop as soon as they are no longer required.**

7.8 Standard authorisations cannot be extended. If it is felt that a person still needs to be deprived of their liberty at the end of an authorisation, the managing authority must request another standard authorisation.

8. URGENT AUTHORISATIONS

8.1 A person may need to be deprived of their liberty before HBC can respond to a request for a standard authorisation. In these situations the managing authority can use an urgent authorisation. Urgent authorisations are granted by the HBC.

8.2 The managing authority can deprive a person of their liberty for up to seven days using an urgent authorisation. It can only be extended (for up to a further seven days) if HBC agrees to a request made by the managing authority to do this.

8.3 When using an urgent authorisation the managing authority must also make a request for a standard authorisation. The managing authority must have a reasonable belief that a standard authorisation would be granted if using an urgent authorisation.

8.4 Before granting an urgent authorisation, the managing authority should try to speak to the family, friends and carers of the person. Their knowledge of the person could mean that deprivation of liberty can be avoided.

9. SAFEGUARDS FOR PEOPLE WHO MAY BE DEPRIVED OF THEIR LIBERTY

9.1 The first safeguard is the assessment process for a standard authorisation which involves at least two independent assessors. There will always be one mental health assessor and one best interests assessor who will stop deprivation of liberty being authorised if they do not think all the conditions are met.

9.2 Family, friends and paid carers who know the person well should be consulted as part of the assessment process. They may have suggestions about how the person can be supported without having to deprive them of their liberty. Those persons who don't have family or friends who can represent them have a right to the support of an Independent Mental Capacity Advocate (IMCA) during the assessment process. And at all times, the fifth principle

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of the Mental Capacity Act, that any decision made in a person's best interests must be the least restrictive of their rights and freedoms, should be kept in mind.

9.3 If the person has an unpaid relevant person's representative, both they and their representative are entitled to the support of an Independent Mental Capacity Advocate.

9.4 If standard authorisation is granted the following safeguards are available:

- The person must be appointed a relevant person's representative as soon as possible. Usually this will be a family member or friend who agrees to take this role. If there is no one willing or able to take this role on an unpaid basis, HBC must pay someone, such as an advocate, to do this.
- The person and their representative can require the authorisation to be reviewed at any time, to see whether the criteria to deprive the person of their liberty are still met, and if so whether any conditions need to change.
- The person and their relevant person's representative have a right to challenge the deprivation of liberty in the Court of Protection at any time.
- If the person has an unpaid relevant person's representative, both they and their representative are entitled to the support of an IMCA.
- The home or hospital should do all it reasonably can to explain to a detained person and their family what their rights of appeal are and give support.

10. WHEN DoLS CANNOT BE USED

10.1 The Deprivation of Liberty Safeguards can only be used if a person is in hospital or a care home. If a person is living in another setting, including in supported living or their own home, it is still possible to deprive the person of their liberty in their best interests, however, this has to be done via an application to the Court of Protection.

10.2 If a person is in hospital they should not be subject to the Deprivation of Liberty Safeguards if they meet the criteria for detention under the Mental Health Act.

10.3 The Deprivation of Liberty Safeguards should not be used if the main reason is to restrict contact with people who may cause the person harm. If it is believed to be in a person's best interests to limit contact an application should be made to the Court of Protection.

10.4 If there is a dispute about where a person should reside, an authorisation does not resolve the dispute. The Code of Practice of the Mental Capacity Act says that unresolved disputes about residence, including the person themselves disagreeing, should be referred to the Court of Protection.

11. ASSESSING CAPACITY

1.1 Key Principles

1.2 The core principles of the MCA 2005 are:

- A person must be assumed to have capacity unless it is established that they lack capacity;

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- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success;
- A person is not to be treated as unable to make a decision merely because they make an unwise decision;
- An act done, or a decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done, or made, in their best interests;
- 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 rights and freedom of action.

12. THE PRESUMPTION OF CAPACITY

12.1 A person must be assumed to have capacity unless it is established that they lack capacity.

12.2 It has to be proven 'on the balance of probabilities' that the person does indeed lack capacity to make their own decisions, that is, it is more likely than not that the person lacks capacity to make this decision.

12.3 Establishing the lack of capacity is time and decision specific therefore we should be asking, "does the person have or lack the capacity to make this decision at this time?"

12.4 Due to the time-specific nature of decision making under the MCA, it may well be that the assessor needs to see the person on a number of different occasions or at a number of different times in order to assess their capacity.

12.5 The MCA and Code of Practice guides us through the process of assessing capacity in what has become known as the 'two part diagnostic and functional test' set out in section 2 and 3 of the MCA.

13. DEFINING A LACK OF CAPACITY

13.1 The MCA 2005 defines a person who lacks capacity as:

13.2 "A person lacks capacity in relation to a matter if at the material time they are unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

13.3 Below are the two "core determinative provision[s]":

- Whether a person is unable to make a decision for themselves; and
- Whether that inability is because of an impairment of, or a disturbance of the functioning of, the mind or brain.

13.4 The acid test consists of three questions:

- Is there an impairment or disturbance?
- Is the person unable to make a decision?
- Is this inability because of the identified impairment or disturbance?

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13.5 There are 2 elements to the acid test; functional and diagnostic.

14. THE DIAGNOSTIC TEST

14.1 In many cases, when assessing capacity, you may be relying on the diagnoses of a clinician.

14.2 The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent. If temporary, you must be able to rationally explain why the decision cannot wait until the person regains capacity.

14.3 It is important to remember that it is not necessary for the impairment or disturbance to fit into one of the diagnoses in the International Classification Diseases 10 or Diagnostic and Statistical Manual of Mental Disorders V. It can also include medical conditions causing confusion, drowsiness, concussion, and the symptoms of drug or alcohol abuse.

15. THE FUNCTIONAL TEST

15.1 The functional test states that a person is unable to make a decision for themselves if they are unable:

- To understand the information relevant to the decision; or
- To retain that information; or
- To use or weigh that information as part of the process of making the decision; or
- To communicate his decision (whether by talking, using sign language or any other means).

16. PRACTICABLE STEPS TO SUPPORT DECISION MAKING

16.1 The MCA states "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 without success".

16.2 As capacity is decision-specific you must be able to define the question at hand and ask the person the question in a manner they will best be able to understand.

16.3 A record must be kept of what information and details about the question and decision the person has been unable to understand, retain, or use and weigh.

16.4 There is no timescale in regards to retaining information as long as the person can retain it for long enough to make an effective decision.

16.5 You must take all reasonable steps to help the Person before concluding that they are nevertheless unable to make a decision. This will include asking yourself and recording the answers to questions such as:

- What is the method of communication with which the Person is most familiar (is it, for instance, a pointing board or visual aids)?
- What is the best time of day to discuss the decision in question with the Person?
- What is the best location to discuss the decision in question with the Person?

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- If you do not know the Person, would it be beneficial to have another person present who does (and, if they do, what role should they play)?
- What help does the Person require to learn about and understand the information relevant to the decision? For example, does the Person need to be taken to see different residential options?
- Perhaps above all, is there something that you can do which might mean that the Person would be able to make the decision? For example, whilst Court of Protection proceedings were ongoing an intensive programme of education could potentially be provided to a learning disabled man, in consequence of which he gained the capacity to consent to sexual relations.

16.6 It is not necessary that the person understands every element of what is being explained to them. What is important is that they can understand the 'salient factors': the information relevant to the decision.

16.7 You should feel confident in your decision and be in a position to explain to the court how questions have been put to the person, where they have been put, and what efforts have been made to ensure that the person understands the information before him or her.

17. UNWISE DECISIONS

17.1 The MCA states "A person is not to be treated as unable to make a decision merely because he makes an unwise decision...[This is] to reflect the nature of human decision making. Different people will make different decisions because they give greater weight to some factors than to others, taking account of their own values and preferences. Some people are keen to express their own individuality or may be more willing to take risks than others."

17.2 Although, an unwise decision cannot be assessed as lacking capacity a series of unwise decisions may indicate the need for an assessment of capacity.

17.3 Staff must avoid making judgements about a person's decision-making abilities based on their own values, ethics and morals. It may be difficult but it is necessary to observe decisions as impersonally as possible, concentrating on whether or not the person is actually able to make the decision in question.

17.4 Where it is believed the person is making or has made an unwise decision staff should question whether the person was/is capable of the steps necessary to reach such a conclusion.

17.5 In complex cases it may be beneficial for staff to consult their Team Manager or Senior Management and consideration should also be given to whether an application to the Court of Protection for a ruling on the person's mental capacity.

18. RECORDING ASSESSMENTS OF CAPACITY

18.1 Record keeping is essential in the mental capacity assessment process. Staff must be able to show that they have followed the principles of the MCA as far as possible and

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have accessible written evidence to reinforce views if it is decided the person lacks capacity.

18.2 HBC forms can be found on the H drive and follow the format of questions standard in many mental capacity assessments:

- What prompted the assessment? That is, what are the particular issues or circumstances with this particular person that raised concerns regarding capacity?

- What is the specific decision or decisions which need to be made at this time?

- Is there an impairment of or disturbance in the functioning of the mind or brain? Is this disturbance permanent, temporary or fluctuating? It's important to note that if there is no impairment or disturbance then the person has capacity to make their own decision.

- Is the person unable to make this decision because of that impairment or disturbance? Are they able to understand the decision and the information given to them to help them make that decision; are they able to retain any information given to them; are they able to use that information in the decision-making process and can they communicate that decision?

- What evidence do you have to support any assertions you have made about the person's abilities?

18.3 once the decision has been made on the balance of probabilities that the person lacks capacity to make the specific decision at the specific time you will need to make the decision on behalf of the person using the principles behind 'best interests' this is unless the decision is one that falls outside of the scope of the act or one that should be made by the Court of Protection.

19. BEST INTERESTS

19.1 The MCA states: "An act done, or a decision made, under this act for or on behalf of a person who lacks capacity must be done, or made, in [their] best interests."

19.2 Section 4 of the MCA sets out requirements for best interests decision making which are underpinned by the best interest checklist in the Code of Practice.

19.3 A person trying to work out the best interests of a person who lacks capacity to make a particular decision ('lacks capacity') should:

Encourage participation

- Do whatever is possible to permit and encourage the person to take part, or to improve their ability to take part, in making the decision.

Identify all relevant circumstances

- Try to identify all the things that the person who lacks capacity would take into account if they were making the decision or acting for themselves.

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Find out the person's views

- Try to find out the views of the person who lacks capacity, including:
  - The person's past and present wishes and feelings – these may have been expressed verbally, in writing or through behaviour or habits.
  - Any beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question.
  - Any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves.

Avoid discrimination

- Do not make assumptions about someone's best interests simply on the basis of the person's age, appearance, condition or behaviour.

Assess whether the person might regain capacity

- Consider whether the person is likely to regain capacity (e.g. after receiving medical treatment). If so, can the decision wait until then?

If the decision concerns life-sustaining treatment

- Do not be motivated in any way by a desire to bring about the person's death.
- Do not make assumptions about the person's quality of life.

Consult others

- If it is practical and appropriate to do so, consult other people for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values. In particular, try to consult:
  - Anyone previously named by the person as someone to be consulted on either the decision in question or on similar issues.
  - Anyone engaged in caring for the person.
  - Close relatives, friends or others who take an interest in the person's welfare.
  - Any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney made by the person.
  - Any deputy appointed by the Court of Protection to make decisions for the person.
- For decisions about major medical treatment or where the person should live and where there is no-one who fits into any of the above categories, an Independent Mental Capacity Advocate (IMCA) must be consulted.
- When consulting, remember that the person who lacks the capacity to make the decision or act for themselves still has a right to keep their affairs private – so it would not be right to share every piece of information with everyone.

Avoid restricting the person's rights

- See if there are other options that may be less restrictive of the person's rights.

Take all of this into account

- Weigh up all of these factors in order to work out what is in the person's best interests.

19.4 It needs to be remembered that there are two circumstances where a best interests decision cannot be made. The first is if the person has made a valid and applicable advance decision to refuse treatment whilst they had capacity to do so. The second relates to involvement in research where specific processes apply.

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19.5 Generally, taking certain decisions for a person lacking capacity to do so are outside of the MCA altogether. These are the decisions listed in S27 of the MCA and include a decision giving consent to marriage, sexual relations or the adoption for a child.

19.6 Certain decisions, set out in the court's Practice Direction E, about serious medical treatments for a person who may lack capacity are reserved to the Court of Protection.

19.7 Record keeping is crucial and staff should record their sources of information, conversations and consultation with others, how you decided on the person's previous wishes and what is in the person's best interests as defined in the information gathering process.

19.8 If there is a dispute about what constitutes the person's best interests it is important that this is acknowledged as part of the record. Sometimes if the dispute appears intractable then independent arbitration may be necessary.

20. CONSIDERING A LESS RESTRICTIVE ALTERNATIVE

20.1 The MCA states: "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 rights and freedom of action."

20.2 In 2014 the Department of Health issued guidance in relation to restrictive practices, which states: "where the person is unable to consent and it is not clear restrictive interventions are in the person's best interests, consideration should be given to approaching the Court of Protection for a best interests decision as to the appropriateness of the proposed intervention."

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Overview of the Deprivation of Liberty Safeguards Process