

# **Guidance on the Relationship between Safeguarding, Best Interests, Deprivation of Liberty and the Court of Protection**

## **1. Introduction**

The purpose of this guidance is to provide greater clarity for staff about the relationship between Safeguarding, Best Interest Decisions, Deprivation of Liberty and the Court of Protection. The need for this guidance stems from a range of operational issues arising from Deprivation Of Liberty Safeguards (DOLS) authorisations/applications, Best Interests decisions relating to a person's welfare and a consequent need to set out the role of the Court of Protection (COP) in making decisions relating to these cases

## **2. Background**

The requirement to set the deprivation of an individual's liberty and the making of Best Interests decisions on a legal footing is set out in the Mental Capacity Act (2005) and this guidance should be read in the context of the following:

- MCA Staff Guidance
- Mental Capacity Act Code of Practice
- Deprivation of Liberty Safeguards Code of Practice
- DOLS Interagency Policy

The Mental Capacity Act provides a statutory framework for people who lack capacity to make decisions for themselves. One of the key principles of the Act is that any act done for, or any decision made on behalf of a person who lacks capacity must be done, or made in that person's best interests. In some cases a person lacking capacity may be placed in a hospital or care home because this is necessary to provide the care and treatment that is deemed to be in their best interests, and on occasion this may necessitate depriving them of their liberty.

## **3. Safeguarding and Best Interests**

An assessment of someone's capacity is an integral part of any safeguarding adults investigation. Where no-one is appointed to act on behalf of someone who may lack capacity it is important that any decision made on their behalf is done in their best interests as defined by the Act. In a safeguarding context such decisions are often made by the local authority arising from a multi-agency adult protection conference. The chair of the conference will need to ensure that the principles of the Act are followed with reference to the Code of Practice and that legal advice is sought as part of this process. In some cases there may be disagreement on the part of family members about a Best Interests decision to place the person in residential care and/or to restrict their contact with other people. These types of decisions are pertinent to the right to private and family life for individuals under Article 8 of the Human Rights Act and any decision which impacts on their residence and/or contact with family members and urgent consideration will need to be given as to whether this is placed before the COP.

#### 4. Best Interests Decision Making

Who is the decision maker?

For most day to day decisions or action, the decision maker will be the carer most directly involved with the person at that time. If the decision involves whether or not to accept proposed care/support the social care worker proposing the support plan will be the decision maker (subject to approval of this by their line manager). If a Lasting Power of Attorney (LPA) has been made and registered then the attorney will be the decision maker, unless the person specifically excluded this decision. If the Court has appointed a deputy then they will be the decision maker if the decision is within the scope of their authority.

How does the decision maker decide what is in the person's best interests?

Making a best interests decision means considering the person's current and future interests, weighing them up and deciding which course of action is, on balance, the best for that person. The MCA includes a statutory checklist which sets out the principles to follow and steps to take when making the decision.

- Consider whether the person will regain capacity and, if so, whether the decision can be postponed until then. This includes considering whether the person has fluctuating capacity or may develop skills that will lead to them gaining capacity to make this decision for themselves in future. A short term decision may need to be made, or put off altogether if the person may be able to make a decision for themselves in future.
- Avoid discriminating against the person by making assumptions about what would be in their best interests eg assuming that adults with a learning disability are better off not living with their parents.
- Consider all the circumstances of which you are aware and which it would be reasonable to regard as relevant.
- Permit and encourage the person to participate in the decision.
- Consider the person's past and present wishes and feelings, however expressed.
- Consider any beliefs and values that would influence their decision if they had capacity to take it.
- Consider any other factors the person would be likely to consider if they could do so eg the effect of the decision on other people.
- Bear in mind that you are not trying to make the decision that you think the person would have made. You are taking their views into account as a factor in making the best interests decision. However if the person has made a written statement and your decision does not follow this you need to clearly record the reasons for this.

- Regard must be had as to whether the purpose for which the decision is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
- Take into account, where practical and appropriate the views of others ie
  - Anyone named by the person to be consulted
  - Anyone engaged in caring for the person
  - Anyone interested in the persons welfare
  - Any donee of a LPA or a court appointed deputy

#### When to refer for an IMCA

Anyone who lacks capacity and does not have someone to support or represent them should be referred to an Independent Mental Capacity Advocate (IMCA) whenever a permanent or long term change of accommodation is being considered or protective measures are being implemented as part of an adult protection investigation.

#### Best Interests Meetings

These should be held when the decision maker needs formal support from the multi- disciplinary team to make the decision and/or where there is an unresolved dispute between the decision maker and family members or other professionals. The family members should be invited wherever practicable to do so.

#### Recording

The MCA form should be completed in all cases. In addition the Best Interests Meeting Record should be used to record decisions taken at these meetings.

#### Disputes

The use of advocacy and/or mediation should always be considered as a means of resolving disputes, particularly where a referral to the COP may result.

### **5. How DOLS works**

The Mental Capacity Act Deprivation of Liberty Safeguards came into force in 2009 and provides a legal framework to ensure people who are deprived of their liberty are protected against overly restrictive care. The role of the DOLS team is to provide an independent assessment of whether someone is deprived of their liberty and to seek authorisation of this where appropriate from the supervisory body. For people residing in care homes in Leicestershire, the supervisory body is Leicestershire County Council. If the deprivation of liberty is not authorised, then the person concerned is at risk of being unlawfully deprived of their liberty if steps are not taken promptly to

care for or treat the person in a less restrictive way. These safeguards offer the person concerned the right to challenge through the court any decision to deprive them of their liberty, a representative to act for them and protect their interests and the right to have their status reviewed and monitored on a regular basis. As well as establishing whether there is a deprivation of liberty, the DOLS assessor will also consider:

- whether it is in the best interest of the person subject to the authorisation
- necessary in order to prevent them coming to harm
- a proportionate response to the likelihood of them suffering harm and the seriousness of that harm.

The DOLS assessor may attach conditions to the authorisation, as may the signatory from the supervisory body

. In the event of the DOLS assessor determining that a deprivation of liberty exists but that they do not believe this is in the person's best interests, then they will:

- liaise with the managing authority (the care home) to establish whether any less restrictive practices can be put in place which will enable the person to receive the care and treatment they need. If this is not possible, they will:
- liaise with the relevant locality team in order that they can implement any conditions which would enable them to support an application. This will often require an urgent review of the best interest decision made by the operational team which resulted in the placement.

If necessary the supervisory body and managing authority will need to arrange a planning meeting within 48 hours to discuss the required action in light of the refusal of authorisation.

The DOLS team can extend an authorisation in order to allow these issues to be addressed, but only for urgent authorisations in exceptional circumstances. Consideration may need to be given to applying to the COP to extend an authorisation. Any restrictions on contact can only be authorised via the DOLS process for a short time and will need to be referred to the COP.

The DOLS signatory also has a role in challenging the assessment and can themselves attach conditions to the authorisation. The signatory should liaise with the DOLS team where they have any queries or concerns about the recommendation or conditions. In the rare event that the DOL is not authorised or the assessor is not inclined to authorise it, the DOLS team will notify the relevant locality team immediately, who will then complete an urgent notification to Legal Services (Appendix A). A legal planning meeting will then need to be arranged.

## 6. The Court of Protection

The person who is the subject of DOLS can make an application to the COP at any stage relating to:

- the qualifying requirements (including issues related to capacity)
- the period of the authorisation
- the purpose of the authorisation
- the conditions attached to the authorisation.

The DOLS team will, as a matter of course, advise the individual of their right to appeal an authorisation. Where the person concerned exercises this right, the DOLS team will notify the relevant locality team, who will then inform Legal Services in line with the process set out in 5 above.

In cases where the DOLS team believe that the decision which led to the placement is not in the person's best interests then the locality team will need to formally review this. Legal advice should always be sought in these cases. If a decision is made to refer the case to the COP then the locality team will need to be able to demonstrate the following to the court as evidence:

- where applicable, a record of the safeguarding investigation and protection plan(s) and the outcome of these
- a mental capacity assessment relevant to the decision
- minutes of any best interests meetings and the record of the decision and the reasons for this

Please note that good practice requires following this process of recording decisions relating to the individual irrespective of the presence of any DOLS issues.

Legal services will also be able to advise on any further requirements of the court, the process of application and the potential costs associated with this. It should be noted that legal advice should be recorded in the legal correspondence section not the case record. Legal advice must not be disclosed to people who are not employees of the Adults and Communities Department unless express permission has been obtained from Legal Services to do so.

In a very small number of cases people who are deemed to have capacity may need to be the subject of a COP application in respect of residence, contact or welfare issues. These cases will usually arise because a risk assessment has identified the potential for self-neglect and/or failure to engage with services and possibly where fluctuating capacity is a feature of the case. In these cases advice should also be sought from legal services in a timely manner.