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Sussex Partnership NHS Foundation Trust

Deprivation of Liberty Safeguards (DOLS) Policy

(Replaces Policy No. TP/MHA&MCA/304 V.3)

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POLICY SPONSOR	Chief Nursing Officer
POLICY AUTHOR	Mental Health Law Practice Development Manager

EXECUTIVE SUMMARY:

- Guidance for staff on the test for whether a patient has been deprived of their liberty
- Guidance on the Mental Capacity Act 2005 (MCA) interface with the Mental Health Act 1983 (MHA)
- Guidance for staff on how to apply for authorisation of a deprivation of liberty where a deprivation cannot be avoided.

If you require this document in another format such as large print, audio or other community language please contact the Corporate Governance Team on 0300 304 1195 or email: policies@sussexpartnership.nhs.uk

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1.0 Introduction

The Deprivation of Liberty Safeguards (DoLS) were introduced into the Mental Capacity Act 2005 (MCA) via the Mental Health Act 2007. The Deprivation of Liberty Safeguards provide legal protection for those vulnerable people who are, or may become, deprived of their liberty within the meaning of Article 5 of the European Convention of Human Rights in a hospital or care home, whether placed under public or private arrangements.

The DoLS provide for a care plan which is so restrictive that it amounts to a deprivation of liberty to be made lawful through 'standard' or 'urgent' authorisation processes. These processes are designed to prevent arbitrary decisions to deprive a person of their liberty.

1.1 Purpose of policy

The purpose of this policy is to support staff in the effective implementation of DoLS, to ensure patients' rights are upheld and that staff act in the patient's Best Interests at all times.

1.2 Definitions

Term/Abbreviation	Meaning
CQC	Care Quality Commission
DoLS	Deprivation of Liberty Safeguards
ECHR	European Court of Human Rights
Managing Authority	For the purposes of this policy this means the Sussex Partnership NHS Foundation Trust Board
MCA 2005	Mental Capacity Act 2005
MHA 1983	Mental Health Act 1983
MHA 2007	Mental Health Act 2007
Supervisory Body	The relevant local authority for the area: West Sussex County Council, East Sussex County Council or Brighton and Hove City Council. An out of area local authority would be the "Supervisory Body" for a patient who is ordinarily resident outside Sussex.

1.3 Scope of policy

DoLS apply to people:

- aged 18 years and over
- who lack capacity to consent to where their treatment and/or care is given and
- are deprived of their liberty in their own Best Interests.

People may be deprived of their liberty by being detained under the MHA 1983 but such people may not be made subject to DoLS at the same time. These legal frameworks are alternative ways of depriving people of liberty.

Children and young people under the age of 18 can be deprived of liberty, but this cannot be authorised by the local authority. See para 4.12 and 4.13 below for more detail.

The conditions of a Community Treatment Order (Section 17A of the Mental Health Act) cannot amount to a deprivation of liberty (see *Welsh Ministers v PJ [2018] UKSC 66)*

1.4 Principles

Every effort should be made when providing care or treatment, to prevent a deprivation of liberty. If deprivation of liberty cannot be avoided, it should be for no longer than is necessary.

The DoLS require that the Managing Authority (i.e. the Trust) must seek authorisation from the Supervisory Body (the Local Authority) in order to be able lawfully to deprive someone of their liberty.

A decision as to whether or not deprivation of liberty arises will depend on all the circumstances of the case. It is neither necessary nor appropriate to apply for a deprivation of liberty authorisation for everyone who is in hospital simply because the person concerned lacks capacity to decide whether or not they should be there.

There is no single definitive test which can determine whether an individual is being deprived of their liberty but what has to be taken into account is the effect of hospitalisation and any care regimes on this patient.

The five key principles of the MCA 2005 apply to DoLS. These must be taken into account when working with, or providing care or treatment for, people who lack capacity.

The five key principles are:

- The presumption of capacity;
- The right for individuals to be supported to make their own decisions;

- The right of individuals to make what might be seen as eccentric or unwise decisions;
- Anything done for or on behalf of people without capacity must be in their Best Interests, and
- Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

Please refer to the Trust's MCA policy on how these principles should be interpreted and applied.

The Trust is committed to ensuring that all people accessing its services are treated with respect and dignity and individuals and their families and carers receive appropriate care and support. This includes consideration of race, age, disability, gender, gender identity, sexual orientation, marriage & civil partnership, pregnancy & maternity and religion & belief.

This policy should not impact in any different way on different age groups or on patients declaring a disability, and care should be taken to ensure that the provisions are not operated in a manner that discriminates against particular age group or against patients declaring a disability.

Guidelines within this policy in respect of patient's mental capacity apply to all patients. Where a patient may have additional needs related to their religion, disability or any other protected characteristics, staff should consider this when making assessment or decision and accommodate this where possible, recognising that this may require extra resource to facilitate.

2.0 Policy Statement

Before applying for an authorisation consideration must be given as to how care and treatment might be provided to avoid depriving someone of their liberty.

The Policy will uphold the principles as described in Chapter 1 of the MCA Code of Practice.

The Trust will deliver services to patients within the legal framework of the MCA 2005 and in accordance with the MCA Code of Practice and the DoLS Code of Practice, as developed by subsequent case law.

Detention and treatment for a person's mental disorder under the MHA 1983 does not come within the scope of the MCA 2005.

3.0 Duties

3.1 Ward Managers

Ward Managers have particular responsibility for identifying patients possibly subject to deprivation of liberty on their wards and if so taking the necessary actions detailed in this policy.

Ward managers must ensure that all practical steps are taken to ensure that the person understands the effect of the authorisation and their rights around it. This includes their right to challenge the authorisation via the Court of Protection, their right to request a review, and their right to and how to instruct an independent mental capacity advocate (IMCA). The appointment of IMCAs will take account of the person's cultural, national, racial and ethnic background. This information must be given to the relevant person both orally and in writing. This must happen as soon as possible and practical after the authorisation is given.

The ward manager should also monitor whether the relevant person's representative maintains regular contact with the person.

3.2 The Doctor

It must be a doctor who undertakes an assessment of capacity to determine if the patient lacks capacity to consent to remaining in hospital. The capacity assessment must be documented in line with the Trust policy and reviewed on a regular basis.

The doctor must liaise with the ward manager/qualified staff to ensure all authorisations and re-applications for further standard authorisations are completed on a timely basis. It is therefore necessary for the dates these re-applications need to be made to be diarised by the care team to ensure appropriate action is taken to prevent unlawful deprivations of liberty or the unnecessary use of repeated urgent authorisations.

3.3 Mental Health Act Office

The MHA office (DoLS Administrator supported by MHA Co-ordinators when required) are responsible for:

- checking that standard forms are fully completed,
- forwarding the completed forms to the appropriate DoLS assessor team;
- liaising with the DoLS assessor teams to ensure the sending of all necessary letters and copies of forms to the person deprived of their liberty and appropriate others including the relevant person's representative;
- maintaining a record of DoLS patients and expiry dates of authorisations
- reminding clinicians of relevant dates and actions required;
- keeping files containing copies of all paperwork connected with the person and their deprivation of liberty. The DoLS paperwork is scanned to Carenotes and then shredded as per shredding protocol.
- notifying the Care Quality Commission (CQC) of the outcome of DoLS referrals.

3.4 All Staff

Sussex Partnership staff visiting or care co-ordinating clients in care homes not run by Sussex Partnership may have responsibility for alerting the managing authority (for example the manager of the care home) of a possible case of deprivation of liberty.

4.0 Procedure

A deprivation of liberty must be authorised in accordance with one of the following legal regimes: a DoLS authorisation or Court of Protection order within the MCA 2005 or (if applicable) under the MHA 1983.

4.1 What is a deprivation of liberty?

In 2014 the Supreme Court handed down their judgment in the landmark cases of ***P v Cheshire West and Chester Council*** **and** ***P and Q v Surrey County Council*****.**

The Supreme Court clarified that there is a deprivation of liberty if:

1. **The person is under continuous supervision and control <u>and</u>**
2. **the person is not free to leave (i.e. would be prevented if they tried to leave) <u>and</u>**
3. **the person lacks capacity to consent to these arrangements**

The Supreme Court clarified that factors which are **NOT** relevant to determining whether or not there is a deprivation of liberty for such people include:

1. the person's compliance or lack of objection,
2. the reason or purpose behind a particular placement and
3. the relative normality of the placement (whatever the comparison is made with)

4.2 DoLS or Mental Health Act (MHA)?

A person who lacks capacity to consent to being admitted to hospital for mental health treatment but who is clearly objecting to it should generally be treated like someone who has capacity and is refusing to consent to mental health treatment. If it is considered necessary to detain them in hospital, and they would have been detained under the MHA if they had the capacity to refuse treatment, the MHA should be used.

If there is a genuine choice between DoLS and the MHA 1983, then a value judgment will need to be made as to the impact of the DoLS regime under the MCA 2005 as compared to the impact of detention under the MHA 1983. The question is: "Which is the least restrictive way <u>for this patient</u> of best achieving the proposed assessment or treatment?"

In all cases where the DoLS regime is appropriate, it is vital to ask whether deprivation of liberty is in the patient's Best Interests and whether there is a less restrictive option. Where there is a real dispute about where a patient's Best Interests may lie, a decision of the Court of Protection must be sought.

4.3 Least restrictive principle

People should be cared for in the least restrictive way possible and care planning should always consider any other less restrictive options that would prevent unnecessary deprivation of liberty.

Awareness of a person's diversity may require care to be offered in an alternative and accessible manner.

Staff involved in the care of people who may lack capacity should familiarise themselves with the provisions of the MCA 2005, in particular the two stage capacity test, and the 5 principles of the MCA, and most specifically the "least restriction" principle.

4.4 The Safeguards

When a person is about to be admitted or is already in a hospital or care home (the Managing Authority) and is identified as lacking capacity and is being or risks being deprived of their liberty, the Managing Authority must apply to the Local Authority (Supervisory Body) for authorisation.

The Supervisory Body will then decide if the application is appropriate (i.e. if the patient is in fact being deprived of their liberty). If it is, the Supervisory Body must carry out 6 assessments:

1. Age – the patient is 18 years or over.
2. Mental health – the patient has a mental disorder within the meaning of the MHA 1983
3. Mental capacity – the patient lacks capacity to consent to admission or to remain in hospital.
4. Eligibility – the patient will be ineligible for DoLS if detained or subject to recall under MHA 1983
5. Best interests – DoLS must be in the patient's best interests, necessary to prevent harm to the patient and a proportionate response, taking into account the patient's diversity.
6. No refusals – the authorisation must not conflict with a valid decision by a donee of a lasting power of attorney or deputy appointed by the Court of Protection nor conflict with a valid and applicable advance decision to refuse treatment.

If the assessments to authorise deprivation of liberty are not satisfied, the application will be refused and alternative ways will need to be found to provide the care and treatment required.

The duration of the deprivation of liberty will be assessed on a case by case basis. The maximum period for an authorisation is 12 months. Authorisation must be in writing include the purpose, time period, any conditions and the reasons that each of the assessments is met.

The person concerned, the person's representative, attorney or deputy, can request a review of the authorisation by the supervisory body and also has a right to make an application to the Court of Protection.

A DoLS authorisation does not authorise care or treatment. This still needs to be carried out under the Best Interests provisions of the MCA and must follow the five key principles of the MCA (see policy).

There are two kinds of authorisation: standard and urgent.

4.5 Standard authorisations

Managing Authorities should apply for a standard authorisation **before** a deprivation of liberty occurs, e.g., when a new care plan is agreed that would result in a deprivation of liberty. Applications should be made on the standard form.

The Supervisory Body is responsible for commissioning the assessments which are used to authorise a deprivation of liberty. These assessments are required by law to be completed within 21 calendar days.

A Managing Authority cannot apply for a standard authorisation more than 28 days before a deprivation of liberty is due to take place.

4.6 Urgent authorisations

Wherever possible, applications for deprivation of liberty authorisations should be made before the deprivation of liberty occurs. However, where the Managing Authority becomes aware that a deprivation of liberty is already occurring, the Managing Authority may grant itself an urgent authorisation, which will make the deprivation of liberty lawful for a period not exceeding 7 days. In this case a request for a standard authorisation must be made simultaneously with the urgent authorisation.

A Managing Authority can grant itself an urgent authorisation where a standard authorisation has been requested but it is believed that the need to deprive the person of their liberty is so urgent that it needs to begin before the request is dealt with by the supervisory body.

Before granting itself an urgent authorisation, a managing authority needs to have a reasonable expectation that the 6 qualifying requirements for standard authorisation are likely to be met.

Urgent authorisations should normally only be used in response to sudden unforeseen needs.

If there are exceptional reasons why the request for a standard authorisation cannot be dealt with within the original urgent authorisation, the Managing Authority may ask the supervisory body to extend the duration of the urgent authorisation for a maximum of a further 7 days. Standard forms are available for making such requests.

4.7 Notifying the Supervisory Body (the Local Authority) of a change

The Managing Authority must notify the Supervisory Body if a standard authorisation should be suspended because the eligibility requirement is no longer being met. They must also notify the Supervisory Body when the eligibility requirement is again met.

Requests for a formal review of a standard authorisation also have to be made to the Supervisory Body.

4.8 Standard forms

Standard forms have been produced for Supervisory Bodies and Managing Authorities to use.

The use of the standard forms will ensure that the correct procedures are followed. Their use will also facilitate consistent practice and simplify reviews, auditing, inspection and the collection of statistics. In addition, use of the forms will ensure compliance with the record-keeping required by statute.

All referrals for deprivation of liberty authorisations must be sent by email to the Mental Health Act office (not direct to the DoLS office): mhateam@sussexpartnership.nhs.uk

All standard forms are available here:
http://staff.sussexpartnership.nhs.uk/i-need-help-with/mental-health-act/deprivation-of-liberty-safeguards-dols

The MHA office will check completeness of information, and then send by email the referral to the relevant local authority (Supervisory Body).

For Brighton & Hove
Access Point, Adult Social Care BHCC
3rd Floor
Bartholomew House
Bartholomew Square
Brighton BN1 1JE

T: 01273 295555
E-mail: Dols@brighton-hove.gov.uk

For East Sussex
DOLS Team
St Mary's House
52 St Leonards Road
Eastbourne BN21 3UU

T: 01323 464 329
E-mail: asc.dols@eastsussex.gov.uk

For West Sussex
Deprivation of Liberty Safeguards Team
Centenary House
Durrington Lane
Worthing
West Sussex BN13 2QB

T: 01903 270 396
E-mail: dols@westsussex.gov.uk

There are three forms that are for completion, as necessary, by the managing authority.

Form	Title and Description
Form 1	Request for standard authorisation and urgent authorisation and request to extend the urgent authorisation. This form also includes the request to extend an Urgent authorisation for a further 7 days.
Form 10	Review request
Form 12	Notification of the death of a patient subject to a Deprivation of Liberty.

The supervisory body notifies the managing authority on form 5 that standard authorisation has been given. Form 6 is used by the supervisory body to notify that standard authorisation has been refused.

4.9 Transfers

If a person subject to DoLS requires transfer to another Sussex Partnership hospital or unit / hospital / care home (public or private sector) the authorisation ceases to be valid. It is therefore necessary for those co-ordinating the transfer to advise the accepting hospital / care home of the need for them to apply for authorisation to continue to deprive the relevant person of their liberty following transfer.

Similarly it will also be necessary for Sussex Partnership to apply for authorisation for anyone subject to DoLS being transferred into the Trust where the deprivation of the person's liberty is expected to continue following transfer.

4.10 Awaiting a DoLS assessment – steps to take

If the urgent authorisation has expired, the DoLS assessment has not taken place and the patient is continuing to be deprived of their liberty this is considered a breach.

Clinical teams are required to take the following steps:

- Keep the care plan under regular review.
- The views of family/friends/carers must be obtained and recorded – any concerns raised must be shared with the relevant DoLS office as a priority.
- If there is no family, friend or carer involved a referral should be made for a Care Act Advocate for the purposes of reviewing the care plan.
- Complete an incident form on Ulysees as a "breach of DoLS".
- Advise the MHA office and relevant DoLS office if the patient is discharged from the ward.

4.11 DoLS and Covert administration of medication

The use of covert methods to administer medication often (not always) indicates that the patient is refusing to accept the medication (whether they have the relevant capacity or not). Where the medication being administered is to treat a mental disorder, use of the Mental Health Act should be considered.

In the Court of Protection case, *AG v BMBC & Anor* [2016] EWCOP 37, the District Judge gave the following non-binding but highly persuasive guidance on this issue for future practice:

1. If the patient lacks capacity, is refusing to take the medication and is unable to understand the risks to their health if they fail to take the medication, then, in exceptional circumstances, covert medication can be considered;

2. Prior to medication being administered covertly, a Best Interests meeting should be held with the relevant healthcare professionals, RPR (if appointed) and family/carers.

3. If there is no agreement, the Trust Legal Department should be contacted to discuss making an immediate application to the Court of Protection;

4. If it is agreed by everyone that covert administration of medication is in the patient's Best Interests, then this must be recorded in the clinical record;

5. The existence of the covert medication must be clearly identified within the Best Interests assessment and DOLS authorisation;

6. An agreed management plan must be adopted allowing for the decision to covertly medicate and the corresponding care and support plan to be reviewed;

7. The management plan should specify the timeframes (possibly monthly, where the standard authorisation is longer than six months) and circumstances (such as change of medication or treatment regime) which would trigger a review;

8. These reviews should involve the relevant healthcare professionals, RPR (if appointed) and family/carers;

9. All of this information must be easily accessible in the clinical record;

10. Where covert medication was anticipated prior to the Best Interests assessment, it would be inappropriate for standard authorisation to be for the maximum period of authorisation.

See also the Trust Medicines Code.

4.12 DoLS and 16/17 year olds

The Deprivation of Liberty safeguards apply to those who are 16/17 years old, however the application for authorisation of the deprivation would be made to the Court of Protection, not the local authority.

The test applied is the same test as for adults:

- Is the young person under **continuous supervision and control?**
- Is the young person **not free to leave?**
- Is the young person **willing and able** to consent to the confinement arrangements?

If the young person has capacity to consent to the arrangements and gives their consent, there will be no deprivation of liberty.

If the young person does not consent they will be deprived of their liberty.

If the young person is unable to consent to the arrangements, it is not possible for anyone with parental responsibility to consent to the arrangements. This was confirmed in the case of *Re D (A Child).*

Where the treatment required is treatment for mental disorder and the young person lacks capacity to consent to the arrangements and where the arrangements would constitute a deprivation of liberty, it is recommended that use of the Mental Health Act is considered.

As with adults, where immediate life-saving treatment is required this is not considered a deprivation of liberty requiring authorisation.

See also the CHYPS Consent policy.

4.13 DoLS and under 16 years of age

It is less clear when the Deprivation of Liberty safeguards might apply to those who are under the age of 16 years.

To determine whether the child is deprived of their liberty, consider whether the restrictions fall within the usual parental control for a child of that age (who does not have a disability).

For example the constant supervision of a 10-year old is unlikely to amount to a deprivation whereas it may well do so for a child aged 12.

If the child has competency to make the decision, it may be possible for them to consent to the arrangements. In this situation there would be no deprivation of liberty.

If the child lacks competency to consent to arrangements that are considered a deprivation of liberty, then, provided this falls within the scope of ordinary acceptable parental restrictions, it may be possible for someone with parental responsibility to consent to the deprivation. Please also see the guidance on the "Scope of Parental Responsibility" in the Mental Health Act Code of Practice (para 19.38-19.48).

Where a child who is subject to a care order is confined, it will be necessary for an application to be made to a court (because neither the local authority nor a parent can consent to the child's confinement).

For more detail, also refer to "Deprivation of Liberty and 16/17 year olds" practice guide. See link in 10.0 below.

4.14 DoLS guidance during the Covid-19 pandemic

The Department of Health & Social Care has issued guidance that remains in force throughout the Covid-19 pandemic in relation to DoLS assessments and decision-making. The full guidance can be found here.

A DoLS authorisation may be used to provide the legal basis for any restrictive arrangements necessary. Testing and treatment should then be delivered following a best interest decision (where the patient lacks the relevant capacity to consent).

Summary of guidance:

4.12.1 Life-sustaining treatment

Treatment for Covid-19 is considered life-sustaining treatment, and so as long as the treatment being given is the same as would normally be given to any person without a mental disorder, then the DoLS provisions do not apply.

For example, a person who is unconscious, semi-conscious or with acute delirium, and needs life-saving treatment (for Covid-19 or anything else) is highly unlikely to be deprived of liberty. They must be treated based on a best interests decision.

If a person's capacity fluctuates it may be more appropriate to consider use of the Emergency Public Health powers. Click here for more details.

4.12.2 Assessments

DoLS assessors should not visit care homes or hospitals unless a face-to-face visit is essential.

Remote techniques, such as telephone or video-calls, should be used as far as possible and where appropriate to do so, taking into account the person's communication needs.

Views should also be sought from those who are concerned for the person's welfare.

Where appropriate and relevant, current assessments can be made by taking into account evidence taken from previous assessments of the person, where it is considered the evidence from the prior assessment is still relevant and valid.

Alternatively, if the assessment was carried out within the last 12 months, this can be relied upon without the need for a further assessment.

5.0 Development, consultation and ratification

Sussex Partnership NHS Foundation Trust's DoLS implementation group were consulted in the writing of version 1 of this policy. The reviewed document has now been reviewed and updated in light of recent case law and relevant process changes.

The policy was ratified by the Policy and Practice Forum.

6.0 Equality and Human Rights Impact Assessment (EHRIA)

The policy has been equality impact assessed in accordance with the Procedural Documents Policy.

7.0 Monitoring Compliance

Mental Health Law Services will report to the Mental Health Act Committee any areas of concern regarding compliance of this policy. The MHAC will agree any audits applicable to this policy.

8.0 Dissemination and Implementation of Policy

8.1 Dissemination

This policy will be uploaded onto the Trust website by the Governance Support Team. Publication will be announced via the Communications e-bulletin to all staff.

8.2 Training

MH Law Services provides DOLS training across the Trust; all staff will be made aware of the requirements of this policy.

9.0 Document Control Including Archive Arrangements

This policy will be stored and archived in accordance with the Trust Procedural Documents Policy.

10.0 Reference documents

- Mental Capacity Act 2005
- Mental Capacity Act 2005 Code of Practice (2007)
- Mental Health Act 1983
- Mental Health Act 1983 Code of Practice (2015)
- *Welsh Ministers v PJ [2018]* UKSC 66 https://www.supremecourt.uk/cases/docs/uksc-2018-0037-judgment.pdf
- *AG v BMBC & Anor* [2016] EWCOP 37 http://www.courtofprotectionhub.uk/news/new-case-alert-re-ag-2016-ewcop-377354523
- Looking after people who lack mental capacity during the Covid 19 pandemic - DHSC https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic-additional-guidancea
- *Re D (A Child)* [2019] UKSC 42 https://www.supremecourt.uk/cases/docs/uksc-2018-0064-judgment.pdf
- Ruck Keene A & Parker C. (2020). *Deprivation of liberty and 16-17 year olds: Practice Guide*. Dartington: Research in Practice.

11.0 Cross reference

Mental Capacity Act 2005 Policy
Medicines Code
CHYPS Consent policy

12.0 Appendix - DoLS Process flowchart