

Deprivation of Liberty Safeguards

When will a Deprivation of Liberty Safeguard (DOLS) be required?

In any situation where a Hospital or Care Home proposes to deprive a person who lacks capacity of their liberty under the Mental Capacity Act 2005 by virtue of their care arrangements without the person's consent contrary to Article 5 of the European Convention on Human Rights ("ECHR"): the right to liberty and security.

A DOLS should not be confused with a person being sectioned in a Hospital under the Mental Health Act 1983.

How is a 'deprivation of liberty' determined?

A person will be deemed to be deprived of their liberty if the person, P, lacks capacity to make a decision about where to live and what care to receive and:

- P is under continuous or constant supervision and control; and
- P is not free to leave his or her residence.

The issue of whether P may object to these care arrangements or attempt to leave is not relevant to whether they are deprived of their liberty.

Is a DOLS required for a person who receives care at home or is in supported living accommodation?

No. A DOLS authorisation only applies where a person who lacks capacity is deprived of their liberty in a Hospital or Care Home environment. A deprivation of liberty in any other context would require an application to the Court of Protection for authorisation.

Presumption of Capacity

The fundamental principle is that any person must be assumed to have the capacity to make a decision (such as whether to reside and receive care in a residential care home), unless it is established otherwise. Capacity is date, time and decision specific because it can change depending on a person's medical condition.

When will a person be deemed to lack capacity?

If there is a concern about whether the person has capacity to make the particular decision in question, their capacity must be assessed according to the following test:

A person is deemed to 'lack capacity' in relation to the decision in question, if he or she is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

If this cannot be established (i.e. the person is able to understand or retain or weigh information relevant to a decision, and is able

to communicate their decision), it is for the person who is to receive the care or treatment to make the decision, not a third party.

If it is established that the person cannot make the decision for themselves, the decision will need to be made for them by someone else on a 'best interests' basis.

Best interests

To determine what is in a person's 'best interests', there are a number of factors which must be considered.

These include: the person's past and present wishes and feelings, the beliefs and values that would be likely to influence the decision if the person had capacity, and any other factors that he or she would be likely to consider if the person were able to do so.

The person must be encouraged to participate in the decision and the decision maker must take into account the views of any Attorneys, Deputies, family members or anyone engaged in caring for the person.

The DOLS assessment and authorisation process

A standard authorisation must be requested where it appears that P is, or will within 28 days, be accommodated in a Hospital or Care Home in circumstances amounting to a deprivation of liberty.

Urgent authorisations may be self-granted by a Hospital or Care Home for up to 7 days (and may be extended for a further period of 7 days) by a Supervisory Body (a Local Authority) upon request.

Upon receipt of a DOLS application from a Hospital or Care Home, a Local Authority must arrange a Best Interests Assessor and a Mental Health Professional to complete a series of 6 assessments to determine whether P meets 6 qualifying requirements. These include:

- 1) P is over 18 years of age.
- 2) P has a mental disorder.
- 3) P lacks capacity to decide that he should be accommodated in the relevant care home or hospital.
- 4) It is in P's best interests to be subject to a deprivation of liberty, which is necessary and proportionate.
- 5) P is not ineligible because of another factor, such as detention for treatment under the Mental Health Act 1983.
- 6) There are no refusals, such as a relevant valid advance decision, or conflicting decision of a Lasting Power of Attorney or Deputy.

If the answer is “yes” to the above questions, a standard authorisation is usually granted for any period up to a maximum of 12 months before the authorisation must be reviewed.

The Local Authority has the power to attach conditions to a standard authorisation which the Hospital or Care Home should adhere to, having regard to any recommendations made by the best interests assessor.

What is a Relevant Person’s Representative (RPR)?

The Local Authority must appoint an RPR as soon as possible after a standard authorisation is granted.

The role of the RPR is to stay in contact with P, to represent and support P in matters relevant to the authorisation.

Who can be appointed as an RPR?

A family member, friend, Attorney or Deputy unless there is evidence to suggest they would not support P’s wish to challenge their deprivation of liberty. For example, a family member may consider it to be in P’s best interests to remain in a care home, despite P’s objections to living there. In these circumstances, the Local Authority should appoint an independent RPR.

What if P wishes to object to a DOLS?

P has an absolute right to challenge the DOLS through the RPR or, if there are delays to the RPR making the application, the Local Authority will have a duty to make an application if they are aware that P is objecting to the DOLS. The process of challenging a DOLS is known as a Section 21A challenge.

The Section 21A Challenge Court Application Process

Applications of this nature are complex. It is essential to obtain legal advice before an application is made.

The process is as follows.

The following Court Forms should be lodged:

1. Form DLA (Application Notice) (if standard)
 - Form DLB (Application Notice) (if urgent)
 - Draft Order
 - Supporting evidence, including a COP24 (Witness Statement)
 - The applicable Court fee
2. Upon receipt of the Application, the Court will issue directions (i.e. instructions). The Judge will confirm these in the First Order.
3. Unless the Court directs otherwise, the applicant will need to serve (which means tells) the Order, along with any relevant papers, with Form DLE (Acknowledgement of Service). Once this has been completed, the applicant will need to file Form DLD (Certificate of Service).
4. A hearing should be listed within 5 working days of the First Order (i.e. the date the application was issued). The hearing is likely to take place at the closest regional court.

5. At the first hearing, each party will submit a position statement and a draft Order to the Court for consideration. The Court will consider whether any further evidence is required, and set further directions for how the case will proceed in order to facilitate a final hearing in which the Court will issue a declaration (the Court’s decision).

What if the RPR does not bring P’s Section 21A challenge?

An application can still be made by a member of P’s family in their own right (subject to the Court’s permission) or acting as P’s litigation friend if there is evidence that P objects to the placement. The proposed litigation friend can apply for non-means tested legal aid on P’s behalf.

How is a Section 21A DOLS challenge funded?

The person subject to the DOLS is eligible for non-means tested legal aid. This means the costs of legal representation to progress a challenge will be met by public funds.

A family member who is not an RPR would be eligible for means-tested legal aid only.

Can family members, Attorneys or Deputy’s participate in Section 21A proceedings to ensure the Court considers their views?

Yes. It is possible to request to be joined as a party to the Section 21A application. In addition, views can be relayed to the Court in writing or orally at the hearings. Other parties will be responsible for the costs of their own legal representation.

What powers does the Court have when considering a Section 21A challenge?

The Court can vary an authorisation, insert a condition for the Hospital or Care Home to comply with, direct that an authorisation be terminated, and make an order about a person’s liability for any act done in connection with an authorisation when the authorisation has been varied or terminated.

The Court also has a discretionary power to make decisions (known as declarations) in relation to whether a person has or lacks capacity to make a specific decision.

What is an Independent Mental Capacity Advocate (IMCA)?

An independent person instructed to represent persons where there is no one independent of statutory services, such as a family member or friend, who is able or willing to represent the person.

When must an IMCA be instructed in the context of DOLS?

An IMCA must be instructed by the Local Authority where an urgent authorisation is made or a standard authorisation is requested or in place, and there is no person to whom it is appropriate to consult with about P’s best interests. If the appointment of an RPR ceases and there is no person whom it is appropriate to consult about P’s best interests an IMCA should be appointed to fulfil the functions of an RPR.

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What is the role of an IMCA?

- To help P and the RPR understand the effect, purpose and duration of the authorisation, any conditions to which it is subject, the reasons why P was found on assessment to meet the qualifying requirements, what their rights are to challenge it, and how to exercise those rights.
- To take such steps as are practicable to help P or the RPR to exercise the right to review or to apply to the Court via Section 21A
- On review, to make submissions to the Local Authority or an assessor carrying out the review.

How can Lester Aldridge assist?

At Lester Aldridge we can provide:

- An initial, free consultation to discuss your circumstances and how to ensure your views are taken into account.
- Representation for Attorneys, Deputies, family members or carers who wish to be represented in Section 21A challenges.
- Access to independent Experts to help challenge a capacity assessment if the evidence suggests a capacity assessment is flawed.
- Advice at each key stage with regard to what steps should be taken to resolve disputes.