

# **Healthy Living Partnership Safeguarding Policy Deprivation of Liberty Standards Policy May 2023**



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## Version Control

Version	Outline	Author	Date
V1.0	Initial Draft based on Provide and Essex Safeguarding Board policies and resources	D Devitt	31 May 2023
V2.0	Refresh of Policies in light of legislative changes	D. Devitt	21 October 2024

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## Acknowledgements:

Mental Capacity Act Code of Practice [Code of Practice HM Gov 2013](#)

Provide Safeguarding Policy suite [Transforming Lives with Innovative Health and Social Care | Provide Community](#)

Essex Safeguarding Policy and Procedures [Guidance, Policies and Protocols | Essex SAB](#)

Social Care Institute for Excellence <https://www.scie.org.uk/mca/dols/at-a-glance/>

NHS Mid and South Essex MCA Update training session 19/09/2024

## 1.0 Introduction:

The Deprivation of Liberty Safeguards (DOLS) apply to any individual aged 18 and over who is being cared for in a registered care home or hospital bed (or supported living facility etc – see section 10.0 below) and lacks the mental capacity to make their own decisions. DOLS does not apply to adults who are lawfully detained by the criminal justice system or detained under the provisions of the Mental Health Act 2007.

## 2.0 HLP – Current Activities and Commitment to Safeguarding

Healthy Living Partnership **does not currently or foreseeably** have any direct contracted or subcontracted relationship or operate on its own either a registered care home or a facility or, any site that might count as a hospital site with bed spaces where DOLS relevant activities (assessments, decisions and implementation of DOLS arrangements to detain individuals) are conducted.

That limitation on the scope of activities delivered by HLP notwithstanding this policy has been drafted to ensure that HLP is well placed to ensure that it is delivering a comprehensive approach to Safeguarding and related policies and able to adapt to future changes in commissioned activities. It stands as a visible sign of HLP's awareness of and commitment to the provision of safeguarding and related assurance for services that are delivered through HLP via subcontracted entities and with a view to ensuring compliance is built into the HLP policy framework before rather than after it becomes necessary.

HLP is essentially a company that holds contracts for organisations that are not (due to their constitutional composition) able to hold these contracts themselves, and require a corporate entity to subcontract them.

These organisations do not currently perform functions where DOLS (or its successor the LPS) functions are entailed, but this is a situation that could potentially change over time.

To provide assurance of HLP's robust and forward-thinking approach to safeguarding this policy and others on different safeguarding themes have been drafted in preparation in case any of the functions do, one day, become an element of HLP business.

HLP will ensure that it monitors and provides assurance to its commissioners that its relationships – either to commissioning bodies or subcontracted entities - align with its commitment and obligations and accountability to commissioners for safeguarding practice and policies in subcontractors.

This will be reviewed on a regular and ongoing basis and especially at the commencement of new contractual relationships where an assessment to ensure a full compliance with relevant safeguarding practice and policies is conducted.

In this way HLP will evolve its safeguarding response in line with future requirements whilst constantly assessing, reflecting upon and improving its safeguarding approach and policy suite.

## 3.0 Evolution of The Human Rights Policy Environment and

The 1948 European Convention on Human Rights (ECHR) sets out a series of articles that guarantee rights to everyone and explicitly with Article 1 the universal Obligation to respect Human Rights<sup>1</sup>.

This sets the tone for the other articles that together express the obligation of nation state and individual rights to protection that supports the inherent dignity of all human beings whatever their context, status, age, health status frailty or challenges.

All human beings have the right to liberty and security of person and no one shall be deprived of their liberty save where this is accordance with due process under the relevant national legal framework.

As yet the legal ramifications of recent policy decisions by the UK Government to set aside the EHCR and replace it with domestic legislative responses are unclear, and the UKs continued adherence to the EHCR is to be confirmed, as is the precise relationship of DOLS to such any replacement overarching framework based upon human rights.

## 4.0 From DOLs to LPS

The Mental Capacity (Amendment) Act 2019 <sup>2</sup>replaces DOLS with the with Liberty Protection Safeguards (LPS).

On 5 April 2023 the Department of Health and Social Care announced the implementation of the Liberty Protection Safeguards (LPS), the Mental Capacity (Amendment) Act 2019, will be delayed “beyond the life of this Parliament” and subsequent analysis suggests it is not likely to be introduced any time before early to mid-2025.

The amendment will provide protection for people aged 16 and above who need to be deprived of their liberty in order to enable their care or treatment, and who lack the mental capacity to consent to their arrangements.

The Liberty Protection Safeguards have been designed to put the rights and wishes of those people at the centre of all decision making on deprivation of liberty.

It is proposed that there will be a one-year period of overlap between DOLS and LPS where DOLS already authorised will run until their expiry date and all DOLS under reviews and new submissions will be authorised under LPS.

This amendment to the Mental Capacity Act 2005 introduces a new process for authorising Deprivations of Liberty safeguards for people who lack capacity to make a particular decision.

Deprivation of Liberty Safeguards will be replaced by Liberty Protection Safeguards (LPS) and it is proposed that any existing DoLS already in place will run until they expire and will then be reviewed under Liberty Protection Safeguards.

The key changes are:

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<sup>1</sup> See [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)

<sup>2</sup> See [Mental Capacity \(Amendment\) Act 2019 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2019/12)

- Three assessments: MCA, Medical assessment, and Necessary & Proportionate assessment.
- Greater involvement for families with an explicit duty to consult with those caring for the person and those interested in their welfare. Family members can act as an appropriate person to represent and support the person through the process.
- Targeted approach where cases can be referred to an Approved Mental Capacity Professionals (AMCP) for consideration, if it is reasonable to believe that a person would not wish to reside or receive care or treatment at the specified place, or the arrangements provide for the person to receive care or treatment apply mainly in an independent hospital.
- LPS is being extended to include 16-17-year-olds.
- LPS will also apply in Domestic settings including the person's own and family home, shared living and Supported living.
- Supervisory Body will be replaced with Responsible Body. These will be NHS foundation trusts for hospital inpatients, CCG/ICSs for CHC funded domiciliary patients and Local Authorities for all others.
- Introduces an element of 'portability' from one setting to another.

(DHSC, 2021)

The next stage of implementation will be a public consultation on the Revised MCA Code of Conduct and LPS Practice Guidance.

This Policy will be reviewed once the Government have completed the public consultation and given a firm date for implementation.

It should be noted that there is cross party agreement and commitment in support of the introduction of LPS, so it is a matter of when, *but not if* it is introduced.

HLP will of course respond to changes in legislation and modify this Policy according once the Government have completed the public consultation on the Practice Guidance for Liberty Protection Safeguards and given a firm date for implementation.

## 5.0 Lawful Deprivation of Liberty

In England and Wales, lawful deprivation of liberty is restricted to those under arrest, if those sentenced to detention by a court, for example if sent to prison, or detained under the provisions of the Mental Health Act 1983, or detained under a Court order, or, Deprivation of Liberty Safeguards authorisation in the case of the Mental Capacity Act 2005, and Mental Health Act, 2007. These provisions flow from Article 5 of the ECHR which provides that no one shall be arbitrarily deprived of his or her liberty. There is an exhaustive list of circumstances in which a person can be lawfully deprived of his or her liberty<sup>25</sup> Article 5(1)(e) provides an exception for the lawful detention of persons of "unsound mind", subject to certain minimum conditions.

Deprivation of liberty can be authorised when<sup>3</sup>:

<sup>3</sup> See <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/890/89005.htm>

1. There is an objective component of confinement in a particular restricted place for a not negligible length of time
2. A subjective component that the individual is unable to validly consent to the arrangements for their care and/or treatment
3. The arrangements are attributable to the state

## 6.0 Purpose

The purpose of this policy is to ensure that HLP Staff and subcontracted entities are able to use a Deprivation of Liberty Safeguard appropriately to protect adults in their care from any unnecessary detention.

HLP understands that the safety, rights and wellbeing of service users is paramount and that they have a right to feel safe and protected from any situation or practice that results in them being harmed or at risk of harm. HLP is committed to ensuring the primacy of service users human rights, choice; and their right to control and be included in care/decision making.

HLP understands these are important for meeting the individual needs of service users and reducing the potential for abuse. It is therefore central to the HLP Safeguarding response.

## 7.0 Definitions

Deprivation of Liberty Safeguards were introduced into the Mental Capacity Act 2005 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 a hospital or Residential care home.

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

The Acid Test<sup>4</sup> clarified that there is a deprivation of liberty if:

- The person is under continuous supervision and control i.e., there is a care plan that requires that staff know their whereabouts at all times
- The person is not free to leave (i.e., would be prevented if they tried to leave) and
- The person lacks capacity to consent to these arrangements

The Deprivation of Liberty Safeguards 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.

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<sup>4</sup> See [The Acid Test from Deprivation of Liberty in the Shadows of the Institution on JSTOR](#)

These processes are designed to prevent arbitrary decisions to deprive a person of their liberty.

### **Managing Authorities**

Care homes and Hospitals have a duty to consider whether the person's needs could be met in a less restrictive way, are the minimum necessary and are in place for the shortest possible time.

They need to ensure that an annual review is completed for any Deprivation of Liberty Safeguard that is still in force.

They need to ensure that their staff are trained in the appropriate use of Mental Capacity Act assessment and Application of Deprivation of Liberty Safeguards.

No one should be deprived of their liberty unless it is in their best interests.

The managing authority is required to notify the Care Quality Commission of authorised Deprivation of Liberty Safeguards and when they are discontinued.

### **Supervisory Body**

The Local Authority will provide Best Interest Assessors to consider all urgent and standard applications for Deprivation of Liberty Safeguards and to grant or refuse authorisation.

### **Court of Protection**

The Court of Protection, established by the Mental Capacity Act 2005, exists to allow anybody deprived of their liberty the right to speedy access to a court that can review the lawfulness of their Deprivation of Liberty.

## **8.0 Duties**

The HLP Board is responsible for ensuring that all care and interventions delivered by HLP Staff and their subcontractors is within the law and respects the human rights of each individual.

The Board is supported in this by the HLP Safeguarding advisor who can provide organisational safeguarding support and leadership to help develop and sustain a positive culture of safeguarding practice; so high-quality care can flourish; and encourage staff to report concerns about poor practice.

Clinical management and oversight for Ward/Department Management and other Senior Ward and residential care Staff are responsible for recognising any instance of possible Deprivation of Liberty Safeguards in the clinical setting they are responsible for and ensuring that all HLP and County policies and procedures are followed.

The HLP Safeguarding lead is responsible for the support of HLP staff and where applicable for subcontractors and will review and monitor practice to enhance staff knowledge and skills.

All Staff have a responsibility to deliver safe and effective care, while working within the law and respecting the human rights of individuals. Each person is accountable for the decisions they make and the consequences of those decisions

All Clinical staff subcontracted to HLP are to be aware of the legal requirement and how to apply for Deprivation of Liberty Safeguards by attending the training offered on a 3-yearly basis.

All Clinical staff subcontracted to HLP needing to complete this training will find this as part of Fitness to Practice in their providers training offer.

## 9.0 Applying for a Deprivation of Liberty Safeguard

When a person is about to be admitted or is already in a ward and is identified as lacking capacity and is at risk of being deprived of their liberty, HLP or its subcontractor (Managing Authority) must apply to the Local Authority (Supervisory Body) for authorisation.

To assess capacity and make a best interest decision; Mental Capacity Act 2005 and HLP 's Mental Capacity Act Policy (*Ref to follow*) must be followed.

All applications (urgent or standard: see relevant section) must be completed by the HLP Safeguarding Advisor, subcontractor Lead; or ward Manager; or most senior nurse; or most senior doctor as appropriate to the context for the application and available at the time of the application.

Only staff who have completed appropriate Mental Capacity Act & Deprivation of Liberty Safeguards training can complete and apply for Deprivation of Liberty Safeguards to the local authority.

A Deprivation of Liberty Safeguards authorisation does not authorise care or treatment which need to be carried out under the Best Interests provisions<sup>5</sup> of the Mental Capacity Act and must follow the five key principles of the Mental Capacity Act (see Policy *Ref to follow*).

Where the Deprivation of Liberty Safeguards regime is appropriate, it is vital to ask whether deprivation of liberty is in the Service User'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.

### **Standard and Urgent Authorisation**

There are two types of authorisations: **Standard and Urgent**. HLP or its subcontracted providers 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

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<sup>5</sup> See [https://www.scie.org.uk/files/mca/directory/best-interest-checklist.pdf?res=true#:~:text=The %27best interests%27 principle underpins the Mental Capacity,be done%2C or made%2C in his best interests.](https://www.scie.org.uk/files/mca/directory/best-interest-checklist.pdf?res=true#:~:text=The%27best interests%27 principle underpins the Mental Capacity,be done%2C or made%2C in his best interests.)" for a handy checklist from colleagues in Lincolnshire via the SCIE.



The national form and guidance are available via the HM Gov website.

<https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance>

### **Standard Authorisation**

HLP and its subcontractors cannot apply for a standard authorisation more than 28 days before a deprivation of liberty is due to take place. See guidance note above via the HM Gov weblink.

The use of the standard/urgent form will help 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 form will ensure compliance with the record-keeping required by statute.

When a person is about to be admitted or is already in a ward and is identified as lacking capacity and is at risk of being deprived of their liberty, HLP or its subcontractor (Managing Authority) must apply to the Local Authority (Supervisory Body) for authorisation.

To assess capacity and make a best interest decision Mental Capacity Act 2005 and HLP Mental Capacity Act Policy (ref to follow) must be followed.

All applications (urgent or standard: see above) must be completed by the HLP safeguarding advisor, Subcontractor Provider Lead; or ward Manager; or most senior nurse; or most senior doctor available.

Only staff who have completed appropriate Mental Capacity Act & Deprivation of Liberty Safeguards training can complete and apply for Deprivation of Liberty Safeguards to the local authority.

A Deprivation of Liberty Safeguards authorisation does not authorise care or treatment. This still needs to be carried out under the best interests' provisions of the Mental Capacity Act and must follow the five key principles of the Mental Capacity Act (see Policy *Ref to follow*).

In all cases where the Deprivation of Liberty Safeguards regime is appropriate, it is vital to ask whether deprivation of liberty is in the Service User'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.

### **Urgent Authorisation**

Wherever possible, applications for deprivation of liberty authorisations should be before the deprivation of liberty occurs. However, where HLP as the Managing Authority becomes aware that a deprivation of liberty is already occurring, HLP will consult with the Local Authority on whether it can 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 standard authorisation will be made to the Local Authority simultaneously with the urgent authorisation.

Subject to confirmation by the Local Authority HLP can give 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. Urgent authorisations should normally only be used in response to sudden unforeseen needs.

Before giving an urgent authorisation, HLP needs to have a reasonable expectation that the following 6 qualifying requirements for standard authorisation are likely to be met:

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 Deprivation of Liberty Safeguards if detained or subject to recall under MHA 1983
5. **Best interests** – Deprivation of Liberty Safeguards 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 advanced decision

The Local Authority, as a Supervisory Body must complete a Best Interest Assessment within 7 days by applying above 6 principles to authorise Standard Deprivation of Liberty Safeguards application.

In Essex all Deprivation of Liberty Safeguards application must be sent to:

[DOLforms@essex.gov.uk](mailto:DOLforms@essex.gov.uk)

HLP contracts that operate in other counties and regions will require local safeguarding contacts to be added in due course.

### **Notifying Supervisory Body**

HLP must notify the Local Authority (Supervisory Body) if a standard authorisation should be suspended because the eligibility requirement is no longer being met. Staff must also notify the Supervisory Body when the eligibility requirement is again met.

If the Local Authority/Supervisory Body fails to carry out a best Interest Assessment to assess Standard Authorisation within 7 days (during the urgent authorisation period), HLP or its subcontracted staff must:

- Inform the Service User
- Family members
- All professionals involved in care
- Inform the Safeguarding Team in the Provider

- Inform the Director of the Provider and HLP Safeguarding Advisor
- Raise an Incident using Datix

The HLP Safeguarding Advisor must communicate with the Local Authority in writing and if necessary, escalate this to the Head of Safeguarding.

## 10.0 Deprivation of Liberty in Supported Living

Individuals may be deprived of their liberty in settings other than registered care homes or hospital and nursing homes. This may include supported living settings, private homes or shared accommodation. It is unlawful for any individual to be deprived of their liberty, except where this occurs through a procedure prescribed by law and the individual has speedy access to the court for a review of the deprivation.

Applications should be made by the relevant Local Authority or Clinical Commissioning Group to the Court of Protection for the authorisation of deprivation of liberty in such settings. Determination of which agency is most appropriate to make the application to the Court may need to be determined on a case-by-case basis – the state authority with greatest responsibility for their care typically being responsible for the application. It is vital where both Local Authority and CCG are responsible for a care-package that there are no delays in appropriate applications to the Court.

For those residents in HLP related Supported Living who lack capacity to make their own decisions and fulfil the requirements of the Acid Test, any applications for Deprivation of Liberty Safeguards will be made by the allocated Social Worker.

## 11.0 Restraint

The right to liberty is a universal right guaranteed by the European Convention on Human Rights to everyone. If restraint is necessary in the best interests of the individual, then any restraint used must be a proportionate response to the degree of harm that might otherwise occur. The nature of the restraint used, length of time it lasted and reasons why it was used must be clearly documented.

The Mental Capacity Act allows restrictions and restraint to be used in a person's support, but only if this is in the best interests of the person who lacks mental capacity to make the decision themselves. Restrictions and restraint must be proportionate to the harm the caregiver is seeking to prevent, and can include:

- using locks or key pads which stop a person going out or into different areas of a building
- the use of some medication, for example, to calm a person
- 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, including if they could cause the person harm

- physically stopping a person from doing something which could cause them and/or others harm
- removing items from a person which could cause them and/or others harm
- holding a 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
- saying to a person they will be restrained if they persist in a certain behaviour

## 9. References

HM Gov 2021 <https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets/liberty-protection-safeguards-what-they-are>

**Essex Safeguarding Board DOLS Safeguarding Policy and Resources Suite**

<https://www.essexsab.org.uk/professionals/mental-capacity-act-and-deprivation-of-liberty-safeguards/>

**Provide DOLS and Liberty Protection Standards**

**Mental Capacity Act 2005 Code of Practice**

[http://www.publicguardian.gov.uk/docs/Mental\\_Capacity\\_Act-code-practice-0509.pdf](http://www.publicguardian.gov.uk/docs/Mental_Capacity_Act-code-practice-0509.pdf)

**Cheshire West and Chester Council v P [2014] UKSC19**

[https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)

**DHSC, 2021, Liberty protection safeguards: Fact sheets.**

<https://www.gov.uk/government/publications/liberty-protection-safeguards-factsheets>