



Southend Essex & Thurrock (SET)

Policy Statement

For
Mental Capacity Act 2005
&
Deprivation of Liberty Safeguards



Document Control Sheet

Title of Policy:	Mental Capacity Act and Deprivation of Liberty Safeguards Policy Statement
Purpose of Policy:	The aim of the SET MCA & Deprivation of Liberty Safeguards Policy statement is to clearly state an agreed pan Essex approach to the adoption and effective implementation of the Deprivation of Liberty Safeguards
Type of Policy:	Policy Statement
Target Audience:	All staff working with Adults & young people 16 or over who may lack capacity in Southend Essex or Thurrock.
Implementation Date:	July 2014
Action required:	This Policy has been agreed by the SET MCA Local Implementation Network (on behalf of Essex and Thurrock agencies) and by the Essex Safeguarding Adults Board and the Thurrock Safeguarding Adults Partnership Board on behalf of all member agencies including Essex County Council, Thurrock Council & Southend Council, Essex Police and all NHS Provider Trusts providing services in Essex & Thurrock.
This policy supersedes:	
This policy should be read alongside:	SET Safeguarding Adults Guidelines, Essex & Thurrock Mental Capacity Act & Deprivation of Liberty Safeguards Policy and Procedures.
Date:	July 2014

Southend Essex and Thurrock MCA & Deprivation of Liberty Safeguards Policy Statement

1. Introduction

The aim of the SET (Southend, Essex & Thurrock) MCA & Deprivation of Liberty Safeguards policy statement is to clearly state an agreed pan Essex approach to the adoption and effective implementation of the MCA & Deprivation of Liberty Safeguards. The policy is closely related to the SET (Southend, Essex & Thurrock) Guidelines on Safeguarding Adults.

The Mental Capacity Act (2005) applies to people aged **16** and over. Guidelines and documentation relating to the assessments of capacity of children and young people under the age of 16 can be found in the Southend, Essex & Thurrock Safeguarding Children SET procedures.

This policy does not address assessments of capacity in respect of the Mental Health Act 1983.

The Mental Capacity Act (2005) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with or caring for an adult who may lack capacity must comply with the Mental Capacity Act (2005) when making decisions or acting for that person. The purpose of the Act is to set out the guidance, legislation and recommendations required to support service provision as specified with the Act.

The Mental Capacity Act (2005) Code of Practice (2007) clearly states that all those working with people who may lack capacity are legally required and have a statutory duty to “have regard to” relevant guidance in the Code of Practice. All those working with people who may lack capacity must be aware of their statutory duty to comply with the MCA and DoLS Codes of Practice when acting or making decisions for someone who lacks capacity to make decisions for themselves. The full Codes of Practice of the Mental Capacity Act 2005 and DoLS 2008 are available on the respective Local Authority web pages and also on the internet.

All those working within SET have a duty and commitment to protect vulnerable adults. Where an adult may lack capacity to make a specific decision, a formal assessment of capacity may be necessary to determine capacity. If an adult lacks capacity, specific decisions or actions may need to be taken on their behalf. Such decisions must be made in their best interests and follow the principles laid out in the Mental Capacity Act.(2005). Where an adult may be vulnerable and may be at risk of abuse or neglect, the SET

Safeguarding Vulnerable Adult Guidance must be followed. Interagency working may be essential if the interests of vulnerable adult are to be safeguarded. The Mental Capacity Act (2007) has implications for all aspects of the work with adults who may lack capacity and for all policies.

All agencies within SET, including the Local Authorities, Health Trusts (CCG's, Acute Trusts and Mental Health Partnership Trusts), private hospitals, care homes and nursing homes should identify a named professional lead who will be responsible for ensuring the effective implementation of the Mental Capacity Act and Deprivation of Liberty Safeguards within their respective organisation and their compliance with the SET MCA & DoLS Policy and Procedures.

The Named Professional Lead will provide a contact point for other agencies and is responsible for linking into the wider SET MCA Local Implementation Networks to share information.

All agencies must ensure they provide support for all professionals with responsibilities for assessing capacity through supervision.

All those working with adults who may lack capacity have a duty of care to protect adults who may lack capacity and their participation in inter-agency support is essential if the interests of vulnerable adults are to be safeguarded.

All agencies **MUST** ensure that all those working with adults (aged 16 and over) who may lack capacity are informed and aware of the MCA and DoLS and comply with the SET Policy and Procedures.

All agencies providing care or treatment for adults who may lack capacity must ensure all staff having contact with service users have received training in the Mental Capacity Act & Deprivation of Liberty Safeguards.

All agencies **MUST** use the SET documentation for recording MCA assessments (MCA1 and MCA2). In addition all NHS Providers must use the SET Consent Form 4 (ConS4) for admission to hospital and/or hospital procedures.

All NHS Providers of care or treatment in SET will use an agreed excel spreadsheet (developed by the MCA LIN) and submit a quarterly return to enable audit of the impact of the MCA and DoLS pan-Essex. Audit reports on the impact of the MCA and DOLS will be presented at the SET Safeguarding Adults Boards. The audit reports will be made available to commissioners of care in SET and all member agencies of the Safeguarding Adults Boards.

Deprivation of Liberty Safeguards (DoLS) is a term used when a person's freedom is taken away through restraint, restriction of movement and control, including the threatened or actual use of force. Its meaning in practice is being defined through case law. A decision as to whether or not Deprivation of Liberty Safeguards arises will depend on the particular circumstances of each situation.

The DoL 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 on Human Rights (ECHR) in a hospital or care home. The safeguards were introduced through amendments to the Mental Capacity Act 2005 (MCA) via the Mental Health Act 2007 (MHA) and were implemented on 1 April 2009.

The safeguards were introduced to provide a legal process and suitable protection in those circumstances where Deprivation of Liberty Safeguards appears to be unavoidable, in a person's own best interests. They provide a framework for authorising the Deprivation of Liberty Safeguards for people who lack the capacity to consent to the arrangements for their treatment or care in either a hospital or care home that, in their own best interests (as defined by the MCA Code of Practice), can only be provided in circumstances that amount to a deprivation of liberty.

The Supreme Court ruling on Deprivation of Liberty Safeguards (19th March 2014) (*P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*) is significant in the determination of whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty. The full judgment can be found on the Supreme Court's website at the following link:

http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

The judgement from the Supreme Court has clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances:

- The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements.

The Supreme Court held that factors which are NOT relevant to determining whether there is a deprivation of liberty include the person's compliance or lack of objection and the reason or purpose behind a particular placement¹. It was also held that the relative normality of the placement, given the person's needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty. However, young persons aged 16 or 17 should be compared to persons of a similar age and maturity without disabilities.

Deprivation of liberty in “domestic” settings

The Supreme Court has held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This will include a placement in a supported living arrangement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements that must be authorised by the Court of Protection.

This policy statement sets the strategic framework for the introduction of the Deprivation of Liberty Safeguards across Essex. The safeguards aim to:

- Ensure that people can be given the care and support they need in the least restrictive environment
- Prevent arbitrary decisions that deprive people of their liberty
- Provide safeguards for vulnerable people who lack capacity
- Provide people with rights of challenge against unlawful detention

2. Guiding Principles

- All individuals, regardless of age, ability, race, gender, sexual orientation, faith or beliefs should have the greatest possible control over their lives.
- A person aged 16 and over must be assumed to have capacity unless it is assessed that they lack capacity (in relation to a specific decision & in accordance with the Mental Capacity Act, 2005; Code of Practice 2007).
- Irrespective of their capacity, people have a right to express their wishes and priorities and to be personally involved when plans are made for their care. Every effort should be made to enable people to make decisions and express their wishes in a way that is appropriate for them and to maximise their participation in any decision-making process.
- A person must not be treated as unable to make a decision merely because they make an unwise decision.
- Where it has been shown that a person lacks capacity, any act done, or decisions made for or on behalf of that person must be done or made in their best interests. This does not remove the duty to consider the appointment of the Court of Protection Deputy
- Before an act is done or a decision is made on behalf of a person who has been shown to lack capacity, regard must be had to whether the purpose for

which it is needed can be as effectively achieved in a way that is consistent with the person's rights and freedom of action.

- Every effort must be made, both in commissioning and providing care or treatment, to prevent a Deprivation of Liberty. If a Deprivation of Liberty Safeguards can-not be avoided, it must not occur for any longer than is necessary, must be the least restrictive option and must be in the best interests of the individual.

All individuals have the right, as citizens:

- To live without fear and free from abuse
- To live as normally as possible in an environment where individuality, independence, privacy and personal dignity are respected.
- An individual's right to make decisions for themselves must be appropriately balanced with their right to be protected from harm if (on the balance of probability) they lack capacity to make decisions to protect themselves.

3. Scope and Exclusions

This policy statement applies to anyone:

- Anyone aged 16 and over who may lack capacity, regardless of disability, diagnosis, physical appearance to make any specific decision due to an impairment or disorder of the mind or brain whether temporary or permanent.
- Anyone currently detained under a secure order (s.25, Children Act, 1989) who may lack capacity to consent to the arrangements for their care and treatment and who is approaching their 18th birthday
- Aged 18 and over who may be deprived of their liberty *and or*
- Who suffers from a mental disorder (as defined under the Mental Health Act, 1983, 2007)
- Who is cared for in a hospital or care home for the purpose of being given care or treatment.
- Who lacks the capacity to give informed consent to the arrangements made for their care and/or treatment
- For whom Deprivation of Liberty Safeguards Authorisation is considered, after an independent assessment, to be necessary and the least restrictive option and in their best interests to protect them from harm.
- Who is ordinarily resident in Southend, Essex or Thurrock.

The Deprivation of Liberty Safeguards does not normally apply to people detained under the Mental Health Act 1983. Where a service user is subject to leave under s.17 (MHA, 1983) and is being deprived of their liberty in an alternative setting (such as a general hospital to enable them to receive care or treatment for a physical condition unrelated to their mental disorder) then health professionals may need to consider applying for a DoLS.

4. Outcomes

The outcomes this policy statement aims to achieve are:

- Development and implementation of appropriate processes and practices pan Essex that ensure that the local authorities, NHS and other health providers and the various commissioned providers meet their statutory duties.
- That no decisions are made for any individual who may lack capacity (aged 16 or over) without their engagement in an assessment of capacity in respect of each individual specific decision, and without that decision being made (where they lack capacity) in their best interests in accordance with the principles of the Mental Capacity Act (2005).
- That no adult (aged 18 or over) is deprived of their liberty unlawfully.
- An agreed approach to the adoption of the Deprivation of Liberty Safeguards that promotes a co-ordinated approach pan Essex but also allows for flexibility in implementation, to take account of differences in organisational structures and practices between the organisations.
- All assessments and approvals of Deprivation of Liberty Safeguards Authorisations are carried out in accordance with legally assured local processes, compliant with the Deprivation of Liberty Safeguards Code of Practice.
- An agreed approach to the adoption of the Deprivation of Liberty Safeguards and co-ordinated assessment procedures and processes with all agencies, including CCGs.
- Established and effective working relationships between different services and professional groups that have roles in the Deprivation of Liberty Safeguards process.
- All key participants in the Deprivation of Liberty Safeguards process are aware of and perform their roles and statutory responsibilities and have regard to the Deprivation of Liberty Safeguards Code of Practice.

- Implementation of effective strategies and local protocols to prevent deprivation of liberty.

5. Regulatory and Policy Context

The Mental Capacity Act 2005

The Mental Capacity Act 2005 provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with and/or caring for any person aged 16 years or over who may lack capacity to make specific decisions must comply with this Act when making decisions or acting for that person, when the person lacks the capacity to make a particular decision for themselves.

The underlying philosophy of the Act is to ensure that any decision made, or action taken, on behalf of someone who lacks capacity to make the decision or to act for themselves is made in their best interests.

The Act is intended to assist and support people who may lack capacity and to discourage anyone who is involved in caring for someone who lacks capacity from being overly restrictive or controlling. But the Act also aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack capacity to make decisions to protect themselves.

The Mental Capacity Act applies in conjunction with other legislation affecting people who may lack capacity in relation to specific matters.

5.1 Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards were inserted into the Mental Capacity Act (2005) via the new Mental Health Act (2007). The safeguards are designed to prevent unlawful deprivations of liberty and to provide safeguards for those whose liberty is deprived to prevent them from coming to significant harm and to ensure all decisions made on their behalf are in their best interests.

The safeguards provide a framework for approving the Deprivation of Liberty Safeguards for people who lack the capacity to consent to treatment or care in either a hospital or care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty.

Under the Deprivation of Liberty Safeguards, Care Homes and Hospitals ('Managing Authorities') have a statutory duty to make formal requests for authorisation to deprive

residents or patients of their liberty, when they believe that the care regime is or is likely to amount to a deprivation of liberty.

Deprivation of liberty in “domestic” settings

The Supreme Court has held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This will include a placement in a supported living arrangement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements that must be authorised by the Court of Protection.

The application for authorisation must be made to the relevant Local Authority. Before giving an Authorisation for a Deprivation of Liberty, the Supervisory Body must be satisfied that a number of conditions are met, including that the person has a mental disorder as defined in section 1 of the Mental Health Act 1983 and lacks capacity to consent to the arrangements for their care and or treatment.

5.2 Identifying a Deprivation of Liberty

To determine whether there has been a Deprivation of Liberty it is necessary to look at a whole range of factors including the type, duration, effects and manner of implementation of the measure in question. The difference between a Deprivation of Liberty and a restriction upon liberty where the measure employed is one of degree or intensity. Every case must be considered on an individual basis and professionals must have to have regard for the Code of Practice as well as the Case Law.

Professionals working with service users in mental health hospital beds must refer to the East of England Mental Capacity Act Regional Implementation Group’s (MCA RIN) guidance for service user’s who may be deprived of their liberty in a mental health hospital bed.

5.3 Relationship between Deprivation of Liberty Safeguards Policy Statement and other Local Policies

This policy statement should be read in conjunction with the respective Southend Safeguarding Vulnerable Adults Board, Essex Safeguarding Adults Boards & Thurrock Safeguarding Adults Partnership Board MCA & DoLS Procedures and the SET Safeguarding Adults Guidance.

5.4 Personalisation and the Transformation of Adult Social Care

The Deprivation of Liberty Safeguards promote the personalisation agenda by putting the best interests of the individual at the heart of the decision making process and by

encouraging individual control and least restraint over personal freedom wherever possible.

5.5 Policy and Process Requirements

Commissioners and providers of care in Southend, Essex and Thurrock are committed to ensuring that any adult who may need to be deprived of their liberty undergoes a comprehensive and timely assessment in accordance with the law and the Deprivation of Liberty Safeguards Code of Practice (2008) and has access to an Independent Mental Capacity Advocate (IMCA) both during the assessment process and where required after a Deprivation of Liberty Safeguards has been authorised. Where appropriate this includes a Paid Representative.

This section outlines the major areas of policy and process that will need to be developed for the successful pan Essex implementation of the Deprivation of Liberty Safeguards.

5.6 Identification of Deprivation of Liberty Safeguards Risk

Managing authorities have responsibility for applying to the relevant Supervisory Body for authorisation of Deprivation of Liberty Safeguards for any person who may come within the scope of the Deprivation of Liberty Safeguards.

Supervisory bodies in Southend, Essex & Thurrock will support Managing Authorities to develop the requisite knowledge of the safeguards and their statutory responsibilities to enable them to develop and implement appropriate internal procedures to effectively identify possible Deprivation of Liberty (Safeguards) and take appropriate action.

Supervisory bodies in Southend, Essex & Thurrock, in partnership with the managing authorities will develop and deliver training, guidance and advice for key stakeholders on identifying Deprivation of Liberty Safeguards and each stakeholder's role and responsibilities.

5.7 Application and Assessment

Supervisory Bodies in conjunction with key stakeholders, have developed application, assessment processes and practice guidance for standard and urgent Deprivation of Liberty Safeguards authorisations consistent with the DoLS Code of Practice. These are detailed in the MCA & DOLS Procedures.

The SET MCA LIN has developed application and assessment processes and practice guidance consistent with the MCA Code of Practice. These are detailed in the MCA & DOLS Procedures.

5.8 Authorisations and Reviews

Supervisory bodies in Essex & Thurrock, Southend, in conjunction with key stakeholders, will develop authorisation and reviews processes and practice guidance for standard and urgent Deprivation of Liberty Safeguards authorisations consistent with the agreed policy.

When developing authorisation and reviews processes, the Supervisory bodies will have regard to the Deprivation of Liberty Safeguards Code of Practice (2008).

5.9 Deprivation of Liberty Safeguards Prevention

Every effort must be made to prevent Deprivation of Liberty Safeguards from occurring.

In order to best ensure that people can be given the care and support they need in the least restrictive environment and to prevent arbitrary decisions that deprive people of their liberty it is necessary to develop and implement a Deprivation of Liberty Safeguards prevention strategy. Local strategies will be implemented by all parties to this policy

5.10 Whole System Requirements

The Southend Safeguarding Vulnerable Adults Board, Essex Safeguarding Adults Boards and Thurrock Safeguarding Adults Partnership Board recognise that to ensure the effective implementation of the Mental Capacity Act and Deprivation of Liberty Safeguards pan Essex, it is necessary to support the capability of organisations to deliver the changes required within the legislation. The SET MCA LIN is a subgroup of the three respective Safeguarding Adults Boards and seeks to promote partnership working, organisational capability and integrated processes and practices.

5.11 Summary – Key Requirements

To ensure the effective pan Essex implementation of the Mental Capacity Act and the Deprivation of Liberty Safeguards there are a number of key requirements. The MCA & DoLS Procedures deliver:

- Operational processes and practice guidance that are fit for purpose ensure that all participants in the process meet their statutory duties, and ensure that decisions are made in the best interests of the person without capacity.
- Policies and processes that integrate across organisations and with existing internal policies and processes.
- Strategies to develop the organisational capacity of local authorities and service providers to implement the Mental Capacity Act and the Deprivation of Liberty Safeguards.
- An effective Deprivation of Liberty Safeguards prevention strategy.

5.12 Monitoring, Review and Evaluation

This policy will be reviewed periodically by the SET MCA LIN as required, but not less frequently than every two years.

It is good practice for monitoring and evaluation of joint policy and procedures to be routinely undertaken to:

- Ensure the quality of policy documents.
- Ensure that policies remain current and valid in light of developing knowledge and major shifts in national or local policy.
- Evaluate the extent to which the intended outcomes stated in the policy are being attained.

Each of the Local Authorities and NHS Providers will have a process of developing a Quality, Monitoring and Evaluation policy setting out their respective approaches to quality assurance, monitoring and evaluation. The policy is being developed in the context of the national personalisation agenda and Putting People First.