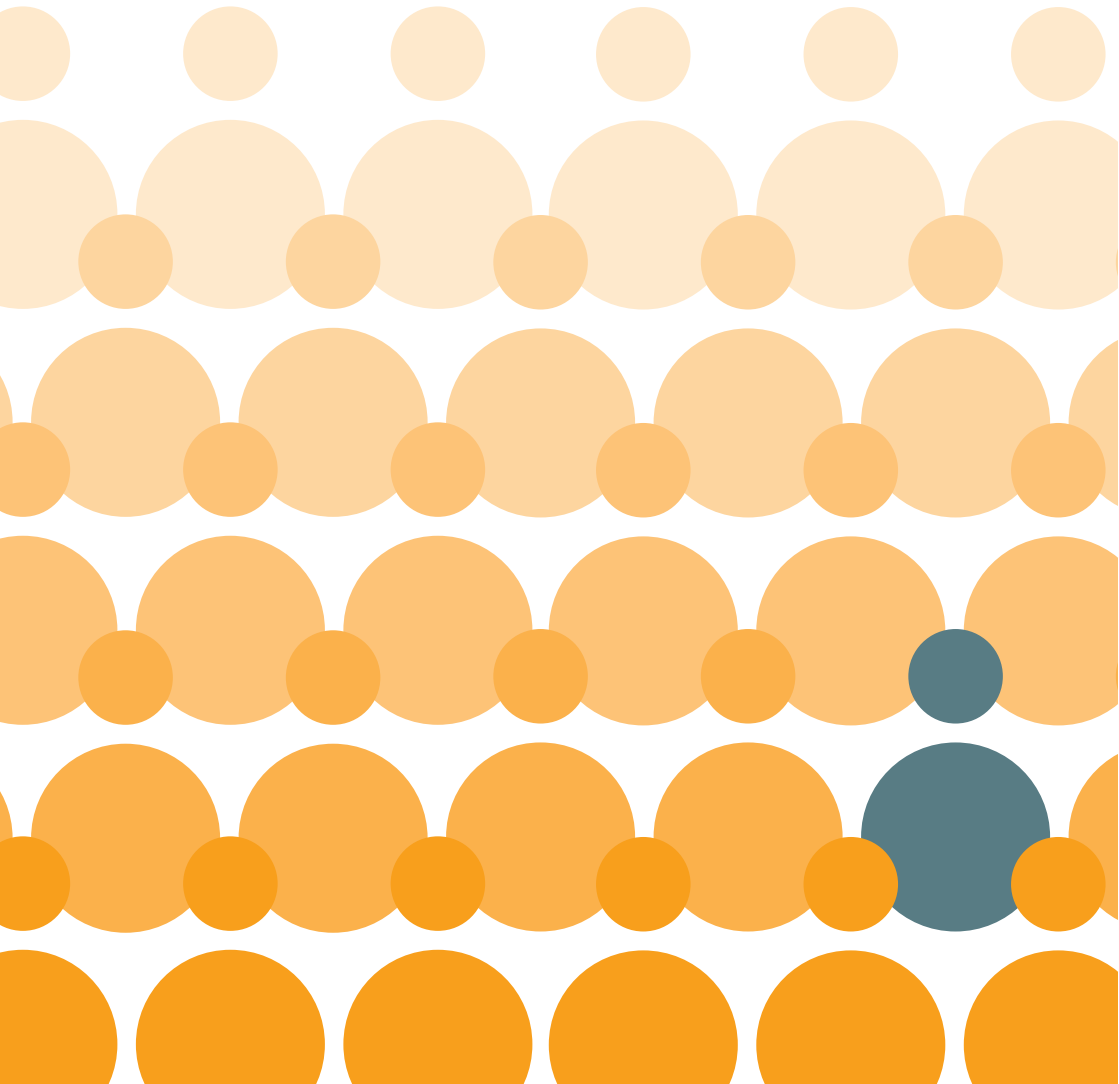


Mental Capacity Act 2005

Deprivation of Liberty Safeguards
A Guide for Families and Carers

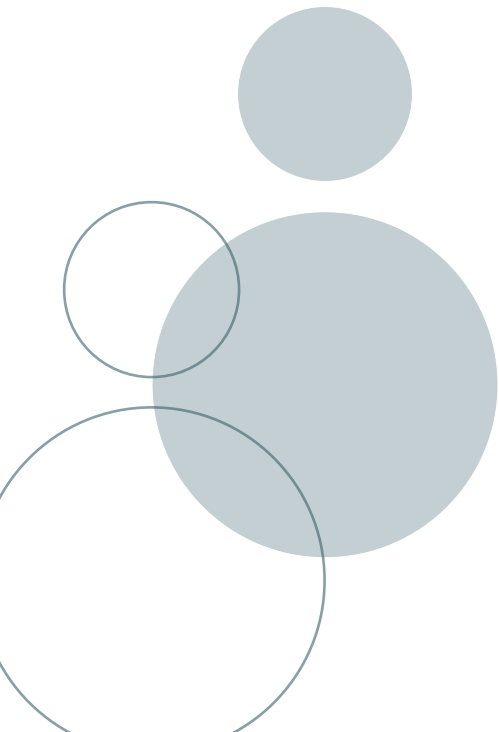




As the relative or carer of a person who may spend some time in hospital or a care home, it is important that you understand what the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS) are. This leaflet will help you provide effective support and know who has what rights under this legislation.

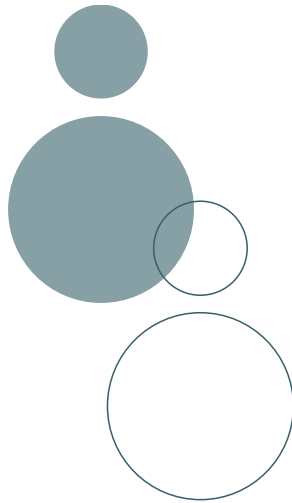
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1. When do these safeguards come into force?

The MCA DOLS will be in force from 1 April 2009 and are part of the Mental Capacity Act 2005.

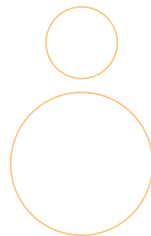


2. Why do we have these safeguards?

The safeguards were introduced after a case called HL v the UK (also known as Bournemouth) went to the European Court of Human Rights.

The case involved a man with autism and learning disabilities who could not make the decision himself about whether or not staying in hospital was the best thing for him. The hospital staff felt it was the best course of action for him to receive the care he needed but his carers disagreed and wanted to care for him at home. Because the hospital staff made the ultimate decision to keep him in hospital, this amounted to him being deprived of his liberty (which would only usually be legally allowed if someone had committed a crime or if they were being detained in hospital under a section of the Mental Health Act).

This case resulted in the MCA DOLS to ensure that people who lack capacity are protected from being deprived of their liberty unlawfully in a hospital or care home.



3. Who do the safeguards apply to?

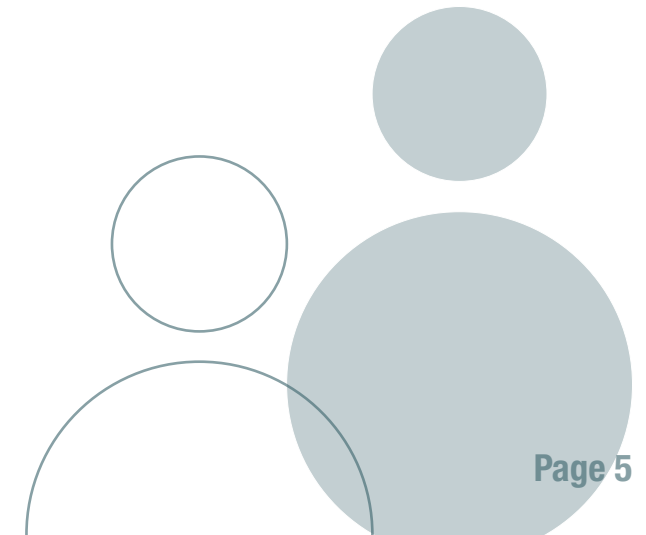
The safeguards only apply to people aged 18 years or over, who lack capacity to make some or all decisions for themselves about where their treatment and/or care is given; need to have their liberty taken away in their own best interests to protect them from harm. They have to be living in a care home or hospital. If a person **does** have capacity to make their own decisions, then these safeguards do **not** apply.

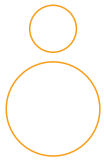
'Mental capacity' is defined in the Mental Capacity Act and to lack capacity, a person has to 'have an impairment of, or a disturbance in their mind or brain'. Examples include dementia, significant learning disabilities and brain damage.

The MCA DOLS apply whether a person is placed under public arrangements (by a local council or NHS body) or private arrangements/self funding in a hospital or care home.

The deprivation of a person's liberty is a very serious matter and should not happen unless it is absolutely necessary and in the best interests of the person concerned. That is why the MCA DOLS have been created: to ensure that any decision to deprive someone of their liberty in hospital or a care home is made following defined processes and in consultation with specific authorities.

The safeguards provide legal protection for people who lack capacity who are or may be deprived of their liberty. They exist to provide a proper legal process and suitable protection in those circumstances where deprivation of liberty appears to be unavoidable in the person's best interests. People are protected because anyone depriving a person who lacks capacity of their liberty must be able to clearly justify the reasons for the deprivation (it cannot be based on a vague notion of what might be best for someone) and the process also allows others, including you, to question and challenge.



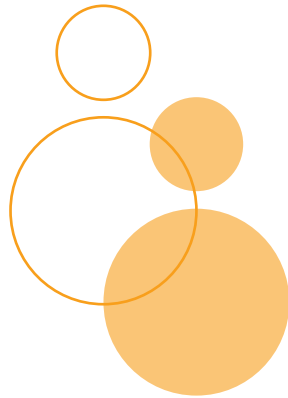


4. What is a deprivation of liberty?

There is no simple definition of what a 'deprivation of liberty' is, as it is based on an individual, their environment and care. When deciding if any actions that are taken are likely to deprive an individual, people must begin by considering:

- what the circumstances are that involve a deprivation of liberty;
- how this will affect the individual; and
- how the deprivation will be put into place and for how long.

The safeguards make it clear that staff should consider what both the person concerned and you think in this process.



There is a Code of Practice which helps guide those involved in the care and treatment of others to be aware if any of the actions they take might be considered a deprivation of liberty. The Code of Practice talks about a 'cumulative effect', which means that one thing by itself may not be considered a deprivation, but when you look at it alongside other things in a person's life they may all add up and accumulate resulting in a deprivation of liberty.

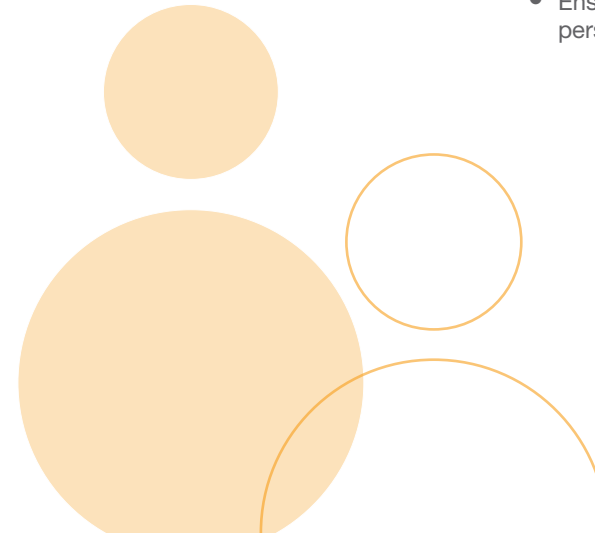
Examples of factors which may be considered a deprivation, either on their own or together with other issues, can include:

- Physical restraint or sedation to manage 'challenging' behaviour.
- Staff having 'complete and effective control' over a person's care or their movement. Meaning that the staff make all the decisions regarding the person regardless of if the person would agree or not to these decisions.
- Staff controlling the person's assessments, treatment, who the person has contact with and where the person lives.
- Staff deciding that the person cannot live where they want or be cared for by others, without permission from the staff to do so.
- Staff restricting access to contact with other people.
- The person being under continuous supervision.

The Code of Practice says that every effort should be made to avoid a deprivation of liberty. A deprivation of liberty should be a last option rather than a first and the person who is making the decisions should consider all other options available and wherever possible choose a 'less restrictive' alternative. Only when all of these have been considered should a deprivation be an option.

For example, less restrictive alternatives may be achieved by helping a person to communicate their needs in other ways, having a different approach to their care such as changes to staffing levels or changes in medication. Any of these measures could prevent the person being deprived of their liberty.

Services should be able to justify to your family member and you the actions and decisions that they take regarding your family members care.



Staff should follow the guidance given in the Code of Practice which identifies ways to help minimise risk and involve the person their family and carers within the decision making process. This includes:-

- Ensuring that staff make decisions in a structured way, that decisions are regularly reviewed and the reasons for making decisions are recorded.
- Person Centred Planning or similar good practice care planning used by staff with the person. (Person Centred Planning or PCP is a method of planning individual support for a person and assist people to make plans for their future)
- Staff ensuring that the person has a proper assessment of capacity.
- Staff considering all options, prior to the person being admitted into a care home or hospital ward.
- Staff supporting the person to maintain contact with their family, carers and friends.
- Ensuring that a regular review of the persons care plan takes place.

5. What if you are concerned that your family member is being deprived of their liberty?

If you are concerned that your family member is being deprived of their liberty without authorisation then the first place to go is the managing authority. This will be a manager or other person of responsibility in the care home or hospital where your family member lives. If you are concerned that abuse is taking place, then you should call the police.

You can ask them to review the situation to see if you can come to an agreement on changing your family members care regime or you can ask the care home or hospital to apply for an authorisation. They then have to reply to you within a reasonable time, this usually means within 24 hours.

If the managing authority does not apply for an authorisation following your concern you can take the issue to the supervisory body, which is either your local council or NHS body.

The supervisory body can then arrange a Best Interests Assessment to assess if your family member is being deprived of their liberty. However, the supervisory body may not do this if a decision has already been made, or it is felt that your concern is 'frivolous'. If dissatisfied at this point, you can contact the Office of the Public Guardian (contacts at the end of this leaflet) or use the supervisory body's complaints procedures.

6. What if you hear from the service that an assessment is being done?

As a family member, you will usually be involved in any assessments around your family member. Under the Best Interests section of the Mental Capacity Act there is a legal obligation to involve anyone who is involved in the care of the person or any interested person, within the decision making process.

This is particularly true if you have a legal role regarding your family member e.g. you are a donee regarding their Lasting Power of Attorney.

If you are dissatisfied with any decisions around this, you can use the managing authority's or supervisory body's complaints procedure, in the first instance.



7. Who is involved?

Managing authority

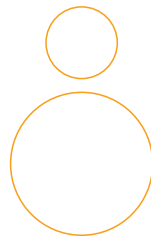
A managing authority is the person or body who manages the care home or the hospital where your family member lives. Their main role will be providing care or treatment to your family member and the other people who live there. It is their responsibility to be concerned about whether the care and treatment they are providing to your family member amounts to a deprivation of liberty, and to take actions to ensure that all other less restrictive options are considered, before deciding to make an application for a deprivation of liberty authorisation.

Supervisory body

The supervisory body is the local council or the NHS, who is funding the service which you or family member is receiving. Following a request from the managing authority, the supervisory body will arrange for your family member to be assessed by at least 2 different people, and use this information to make a decision. If the assessments agree that your family member is being deprived of liberty then the supervisory body will authorise the deprivation of liberty.

The supervisory body also set the rules, such as how long the authorisation will last and when it should be reviewed and appoint a relevant person's representative. The Supervisory Body is also responsible for providing an Independent Mental Capacity Advocate (IMCA) for extra support where needed (see later section on IMCA's).

The supervisory body also makes decisions about when an authorisation meets the criteria for review.





8. Assessment process

If it is considered that your family member is at risk of being deprived of liberty then they will undergo a series of 6 assessments. These are:-

1. Age assessment

To check that they are aged 18 years or over.

2. No Refusals

For example, has your family member made an advance decision to refuse treatment or a lasting power of attorney which is in conflict with the potential deprivation?

3. Mental Capacity Assessment

This will assess if your family member can make the decision themselves or if they lack capacity to make the decision. This assessment will follow the principles of the Mental Capacity Act 2005.

4. Mental Health Assessment

This assessment is to find out if your family member has a medically diagnosed 'mental disorder' as defined in the Mental Health Act 1983, and which can include people with learning disabilities. It is not to assess if your family member needs mental health treatment. It will be carried out by an approved doctor.

5. Eligibility Assessment

This means if your family members is being detained or has other requirements under the Mental Health Act 1983 meaning that an authorisation under the deprivation of liberty safeguards can not be used.

6. Best Interests Assessment

This assessment is to decide if the deprivation is in the best interests of your family member; it is necessary to protect them from harm and that the deprivation is a proportionate response to the likelihood and severity of that harm. This harm might include being harmed by others as a result of their lack of capacity, regarding risk, for example.

The supervisory body will decide the order of the assessments. The Mental Health Assessor and the Best Interests Assessor must be two different assessors. The other four assessments can usually be done by either of these Assessors or other eligible assessor as defined by the Code of Practice.

The role of the Best Interests Assessor is of particular importance to you as a family member or carer as this is the assessment where you will be involved. The Best Interests Assessor will work in line with the Mental Capacity Act 2005 principles and Best Interests checklist, and consider other relevant factors.

The Best Interests Assessor will:

- Decide if a deprivation of liberty is taking place or is likely to take place.
- Review all relevant assessments and care plans.
- Seek the views of any interested person e.g. the person, their family members and relatives, carers, advocates, donee or deputy.

They can also make recommendations, for example who might be appointed as your family member's representative or about the duration of the authorisation.

For each of the other five assessments, the relevant assessor will gather the information about your family member that is required by the criteria for that particular assessment. They will then record their assessment and report the results, giving copies of it to:

- The managing authority
- Your family member and their representative
- Any IMCA

9. When can an authorisation be given?

When all the assessments have been completed, the supervisory body will use these to make a decision about whether or not they will give an authorisation. The supervisory body has three options available to them:-

- a. An authorisation is given. If a standard authorisation is given, the supervisory body will inform your family member and their representative, the managing authority and other relevant interested persons, stating how long that the authorisation is in place for and the reasons why they are giving the authorisation.

They will appoint a representative for your family member. This is covered later in this leaflet.

The supervisory body will carry out the review of the authorisation.

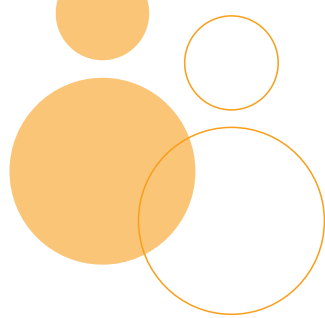
- b. An authorisation is not given

If an authorisation is not given following the assessment process it can be because the requirements are not met

It may be that an authorisation is not given because a deprivation of liberty is not happening, or it may be that the staff have poor working practices or staffing issues, for example, your family member can't access the local community due to staffing issues. If issues are raised about the standard of care given to your family member, then you have the right to complain. The care home or ward where your family member lives will have a complaints procedure, ask them if you can have a copy of this and this will explain who you need to contact.

An authorisation is given, with conditions.

Sometimes an authorisation is given but it might have certain conditions, as recommended by the Best Interests Assessor e.g. the person can go to certain venues, but can only have contact with certain people if they have someone else there to support them.



10. Who is the Relevant Person’s Representative?

c. Authorisations should be requested before a deprivation of liberty happens. Under the rules in the Code of Practice, assessments should take no longer than 21 days in total, so a managing authority should apply for an authorisation in enough time to accommodate this.

However, in some cases it may not be possible to wait for a standard authorisation to be completed before depriving your family member of liberty, if it is considered that they are at serious risk of harm, for example, a sudden change in a person’s mental health.

In this kind of special situation, the managing authority can give an urgent authorisation for up to 7 days.. Urgent authorisations can not be granted without a simultaneous application for a standard authorisation to the supervisory body being made. If the 6 assessments cannot be completed within this time and there are exceptional reasons for this, the supervisory body can extend the urgent authorisation by a further 7 days, to allow the assessments to be completed.

Authorisations will usually be given for the shortest possible timescale e.g. 3 months. The maximum timescale for an authorisation is 12 months. If it is likely that your family member will still need to be deprived after 12 months, then the managing authority will need to make a new application to the supervisory body to ensure that they are depriving your family member lawfully.

Everyone who is subject to an authorisation has to have a Relevant Person’s Representative. The Representative is appointed by the supervisory body, they are independent of the hospital or care home and they are appointed to maintain contact with your family member, to represent and support them in all matters relating to the MCA DOLS.

To be the representative, you need to be over 18 years of age, able to keep in contact with your family member and willing to take on the role.

As the Relevant Person’s Representative has to be independent of the hospital or care home no one can take this role if they are involved in the managing authority, supervisory body or in your family members care plan or treatment.

The Relevant Person’s Representative will be supported within their role, and it is the managing authority’s responsibility to ensure that this person is aware of the support that is available. Extra support is available from an IMCA, if your family member or their Representative need this to access the review process or the Court of protection.

The Relevant Person’s representative will usually be recruited from family members or friends. Where the person has no one to support them, the supervisory body must appoint a paid representative to undertake this role.

11. Who is an Independent Mental Capacity Advocate?

An Independent Mental Capacity Advocate or IMCA is a special kind of advocate, who is used to support specific people in specific situations and are an additional safeguard for particularly vulnerable people. An IMCA is only involved when an individual lacks capacity to make some or all decisions for themselves.

In relation to deprivation of liberty an IMCA may be called on for the following reasons:

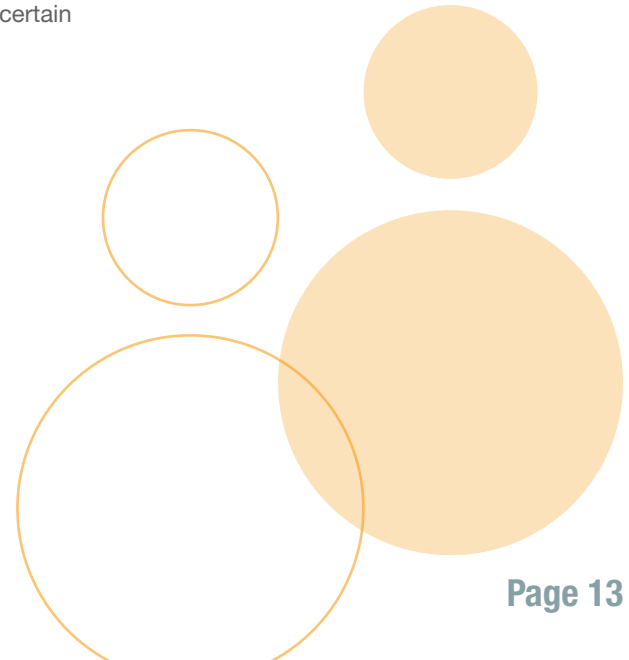
- When the persons being deprived of their liberty has not got anyone else who can represent them.
- If your family member or their representative requests additional support from the IMCA to access the review process or the Court of Protection.
- If the supervisory body feels that an IMCA might be needed to meet certain requirements.

12. When will an authorisation be reviewed?

It may be that your family member no longer meets the requirements of the authorisation or there may have been a change in their situation. If this is the case the following can ask the supervisory body for a review of the authorisation:-

- Your family member
- Your family member’s representative
- Your family member’s IMCA
- The managing authority

The supervisory body will decide if an authorisation meets the requirements for a review and if so will conduct the review process. The supervising body will inform your family member and their representative and the managing authority that they are doing so.



13. What is the Court of Protection?

The Court of Protection is a specialist court for all issues relating to people who cannot make some decisions for themselves.

The Court of Protection can:

- Change or terminate an authorisation
- Instruct a supervisory body or managing authority to change or terminate an authorisation.

The following people have automatic right to apply to the Court of Protection:-

- The donee of your family member's Lasting Power of Attorney
- A court appointed deputy for your family member.
- Your family member's representative

If you want to apply to the Court of Protection on behalf of your family member but you do not fit any of the above categories, you first have to obtain permission of the court before making an application.

14. How are the safeguards monitored?

The managing authority has a duty to monitor your family member's situation on an ongoing basis.

To ensure that the MCA DOLS are being used in a proper and legal way and that no one is being detained improperly, the MCA DOLS will be monitored by The Care Quality Commission. From 1 April 2009 The Care Quality Commission (CQC) will replace the:-

- The Commission for Social Care Inspection
- The Healthcare Commission
- The Mental Health Act Commission

It will take over responsibility for regulation and monitoring all adult social care and health across England, in addition to looking after the interests of people who are detained under the Mental Health Act.

CQC will monitor how the safeguards are being used by:-

- visiting registered care homes and hospital wards
- speaking with the patients/ residents who live there (if appropriate to do so)
- Checking the hospital or home's records and documentation.



You can get hold of further information about the CQC and their role from:-

Care Quality Commission
7th Floor, New Kings Beam House
22 Upper Ground
London SE1 9BW

Telephone: 03000 616161

Website: www.cqc.org.uk

15. What is the Code of Practice?

To find out more information about the MCA DOLS there is a Code of Practice, which is a 'rule book' for people who are involved to follow. It is a useful resource and the following people have to follow it, to make sure that they are acting in a lawful way:-

- Anyone who has a role which relates to the MCA DOLS
- Anyone who acts as a 'relevant person's representative'.

You can get a copy of the Code of Practice to download from www.publicguardian.gov.uk or you can get a hard copy from the Stationary Office www.tso.co.uk

16. Further information

If you are concerned that the person who you care for is being detained or deprived of their liberty in a way that you feel is not right or legal then you can view the information of the Department of Health MCA DOLS website (www.dh.gov.uk) in the first instance. You can also contact the Office of the Public Guardian (OPG). They will advise you what to do or what should be happening and are a useful source of information.

The opening hours are 9am – 5pm Monday – Friday and their details are as follows:

Website: www.publicguardian.gov.uk

Email: custserv@publicguardian.gsi.gov.uk

Telephone: 0845 330 2900 (local call rate)

Text phone: 020 7664 7755

Address:
Office of the Public Guardian
Archway Tower
2 Junction Road
London N19 5SZ

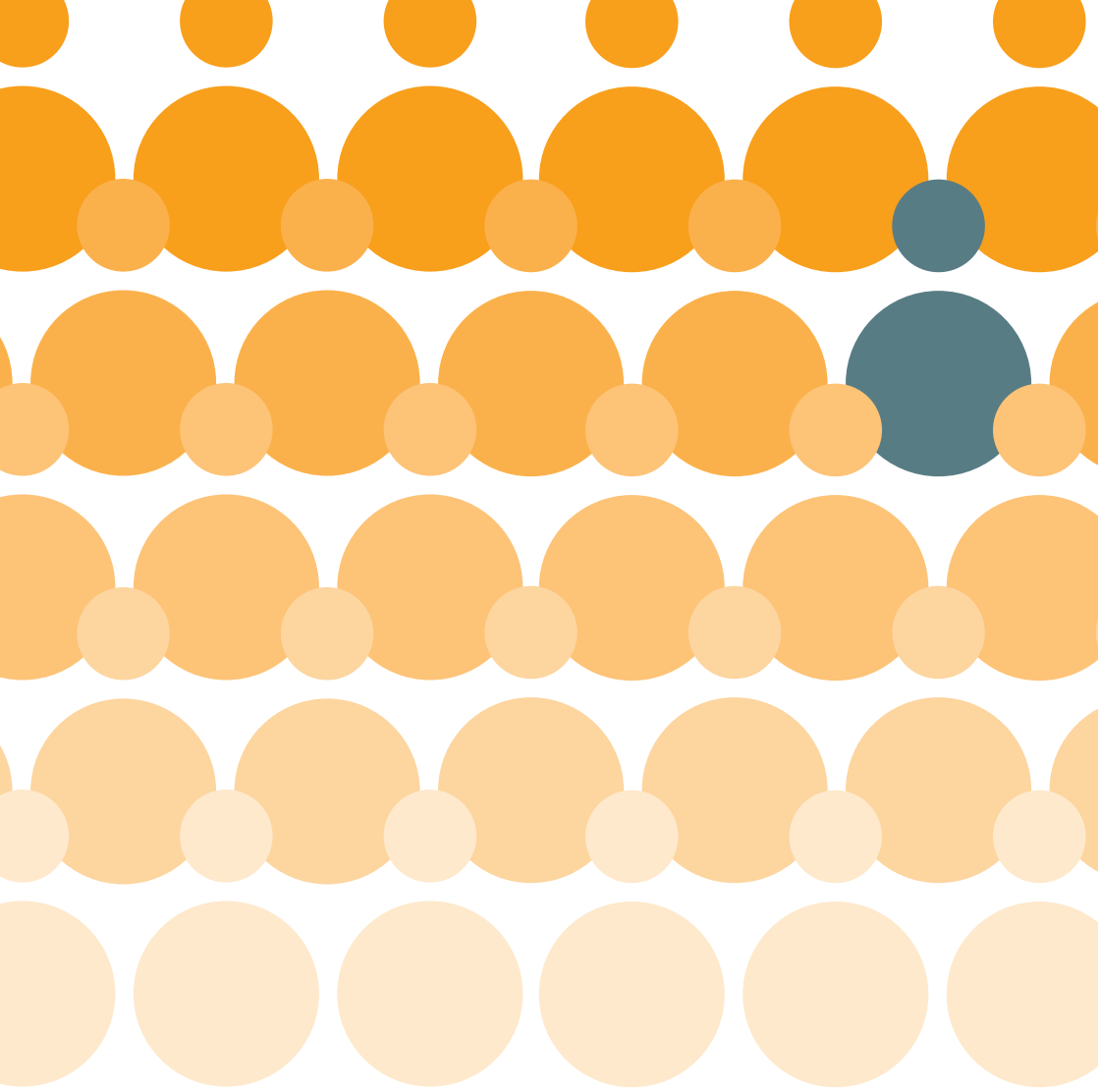
If you feel that you need to know more information around the Mental Capacity Act 2005. There is a guide available called:

Making decisions A guide for family, friends and other unpaid carers

Which is available from the Department of Constitutional Affairs website:

www.dca.gov.uk





Action
on elder abuse

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