



Guidance on Deprivation of Liberty Safeguards – Community Settings

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Policy Summary

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1. Introduction

In the UK personal liberty is protected under the Human Rights Act 1998. Specifically, Article 5 refers to 'the right to liberty and security' and focusses on protecting people from unreasonable detention and defends their personal freedoms.

There are instances, however, where illness, impairments or injury affects a person's decision making capacity to consent to care and treatment which is necessary to keep them safe from harm.

Deprivation of Liberty Safeguards (DoLS) are a legal framework under which a person can be protected and safely cared for against their will because they lack the mental capacity to make decisions for themselves. A person can be deprived of their liberty in certain circumstances, provided set rules are followed and as a result of them being unable to consent to the care and support needed to keep them safe and well.

For those people living in residential care homes, nursing homes and in hospital settings the Deprivation of Liberty Safeguards (DoLS), enacted in 2009 as amendments to the Mental Capacity Act 2005, provide the legal controls which ensure a person is properly represented, that arbitrary decisions are not made on their behalf and that they are not deprived of their liberty unless it is in their 'best interests'. The rigorous application process involved in the Safeguards is in place to ensure that any deprivation is 'necessary and proportionate' to the care and treatment required.

For DoLS the local authority, within which the deprivation is taking place, will act as the 'Statutory Body' to authorise and oversee care arrangements. In some case the deprivation setting may be outside of the local authority area, known as an 'out-of-borough placement', but where the subject of the DoLS is ordinarily resident in the borough.

A person is considered to be deprived of their liberty if they are restricted by their care package, where they live or how they are supported and are unable to take part in the decisions about these restrictions.

Case law in 2014 further defined an 'acid test' of deprivation for those who lack mental capacity to consent to care and treatment, which asks:

- Are they free to leave the care/treatment setting?
- Are they subject to continuous supervision, monitoring and control?

This put a new threshold on what amounts to a deprivation and broadened the need to scrutinise other care systems and arrangements outside of those cover by DoLS. It meant that deprivation safeguards needed to be looked at in a wider context and in consideration of community settings, where health and care provision is delivered, such as in a person's own home or in a shared or supported living arrangement.

The process here involves an application to the Court of Protection (CoP) and possible court proceedings. Within Halton Borough Council the Integrated Adult Safeguarding Unit (IASU) are able to support social work and assessment teams with these applications.

This guidance looks at situations where care and treatment is being given in a community setting which amounts to a deprivation of liberty. It looks at the identification of a need for the community DoLS, what that process entails and the formal appointment of a decision maker who will represent the best interests of the cared for person.

See also:

[Mental Capacity Act 2005 Policy](#)

[Mental Capacity Act 2005 - Deprivation of Liberty Safeguards Policy](#)

2. Community DoLS

'Community DoLS' is an informal title given to the processes under which a person can be lawfully deprived of their liberty in order that necessary care and treatment can be given in their best interests in a community setting.

It involves application to the Court of Protection (CoP) for an individual Welfare Order to be put in place for the person subject to the deprivation. This requires a review of the care and treatment arrangements and a judgement to see whether there is a less restrictive way of delivering support.

In some cases action being taken may not be in the person's best interests, and independent oversight will identify this and any changes required.

The Order appoints a responsible individual to oversee the decisions made about the cared for person's health and welfare where they lack mental capacity to make those decisions for themselves.

Alternative arrangements can be brought to the CoP to look at decisions made about the financial affairs or property of a person who lacks capacity.

See also:

[Mental Capacity Act 2005 – Advance Planning](#)

[Halton Borough Council Corporate Appointeeship and Deputyship Scheme Policy*](#)

*under review as at the date of publication of this policy

3. How a Community DoLS is identified?

Usually, a person's care manager (Social Worker or healthcare professional) would assess whether the 'acid test' threshold has been met and whether they think that an application to the CoP is required.

It is also permissible for the care setting to identify a need for more formal arrangements themselves and for the Council to then take forward this referral. This, again, would be done by the relevant service supporting the individual, e.g. a Social Worker in care and assessment teams or a Nurse in the Disability Nursing team.

Where the Council is the commissioner of a publicly-funded, community-based service (including packages of care and any residential placements) it is their legal responsibility to ensure that deprivations are not being made unlawfully.

4. Decision making representatives in community DoLS arrangements

This community DoLS process requires a close relative, friend or paid Advocate to represent the cared for person. The Court refers to the role of the representative as either a "Rule 1.2 Representative" or "Litigation Friend".

In most cases the deprivation process involves an application to the CoP where the representative does not need to attend a hearing, they are known as the 'Rule 1.2 Representative'. If for any reason a court hearing is necessary the role may then be referred to as "Litigation Friend".

4.1 Rule 1.2 Representative

The role of the 1.2 Representative is to oversee a person's care and support needs and advises the Court on their 'best interests'. Best interests ensure that the cared for person has had their views, wishes, values and prior decisions taken into account when a decision is made or action is taken about their care and support.

The 1.2 Representative can stipulate whether they agree or do not agree that the Court should authorise the deprivation of liberty needs and arrangements that have arisen as part of the person's package of care and support.

The role includes:-

- a) Reviewing and considering what is in the person's best interests taking into account any views the person may have expressed in the past, any beliefs or values they are aware the person holds and any other matters they consider relevant to the circumstances. They must not represent their own views but views on behalf of the person;
- b) Ensuring the care being provided is meeting the person's needs; maintaining regular contact with the person to check this;
- c) Ensuring the care provided is the least restrictive option available and challenging decisions if considered inappropriate or disproportionate to needs;

- d) Considering the pros and cons of the package of care and support and other available options;
- e) Keeping the care package under review and raising any points relating to the arrangements, changes in the person's behaviour or health with the Court; and
- f) Considering the application paperwork submitted by the Social Worker (or other professional) representing Halton Borough Council (HBC) ensuring it is accurate and that they agree with the content. This involves highlighting any matters that they feel needs clarification or change, discussing matters with the person as far as possible in terms of what they think about the package of care. Also, considering whether they support the application and if the matter can be considered without the need for a hearing, ensuring that they have determined with the person whether they want to take part in proceedings and if they do raise this with HBC and include details in the witness statement to the Court (See Section 4.5.a).

See also: See Section Two of [The Court of Protection Rules 2017](#)

4.2 Litigation Friend

A Litigation Friend is the name given to an appointed person when the Court feels that a cared for person can be involved in the Court process directly. They are regarded as an 'Officer of the Court'.

The Litigation Friend will take the place of the person in the court process and will be able to give instruction to the person's solicitor, if they have one.

A Litigation Friend must:

- a.) Consider whether the person has the capacity to make decisions in terms of the Court Proceedings and if not make decisions that are in the best interests of the person in respect to those proceedings;
- b.) Make every attempt to communicate with the person about what is happening in the case. Litigation Friends can progress a case that the person themselves does not currently agree with provided they have considered all relevant factors and are of the view that what they progress is in the best interests of the person;
- c.) Potentially pay costs if ordered by the Court;
- d.) Attend Court and possibly speak to the Judge on behalf of the person. A Litigation Friend can instruct a solicitor, and legal aid funding may be available based on the financial means of the person subject to the application (NOT the Litigation Friends' means).

A solicitor can advise the Litigation Friend but it is still the Litigation Friend's role to make the decisions about how the progress the case on behalf of the person receiving care and support.

See also: [Litigation Friends](#)

4.3 The difference between a 1.2 Representative and a Litigation Friend

1.2 Representatives are more appropriate for matters which are more straightforward and do not require ongoing Court Proceedings. 1.2 Representatives will most likely be appointed in the streamlined process for applications to the Court of Protection in respect of Deprivation of Liberty.

For more complex cases where matters are in dispute and will require ongoing Court proceedings it is envisaged that a Litigation Friend is more appropriate.

The Local Authority will review the case and form a view on which type of representative is required, however the final decisions will rest with the Court.

4.4 Who can be a 1.2 Representative or Litigation Friend

No specialist training or legal expertise is required. The individual must be:

- a.) 18 years old or over;
- b.) Actively involved with the person and have detailed knowledge of them;
- c.) Able to act in the person's best interests and act competently and fairly; and
- d.) Agree to act for the person.

They must **not have** any interest that is adverse to the person (e.g. a financial stakeholder for the care agency delivering the person's care).

Within Halton Borough Council's processes a 1.2 Representative or Litigation Friend may be appointed as part of an advocacy arrangement. This would involve a paid 'Advocate' being employed on the person's behalf where no other person is able to represent their needs.

See also: Part 17, Sections 1 and 2 – [The Court of Protections Rules 2017](#)

4.5 How to become a 1.2 Representative or Litigation Friend

If a person is identified to act in either of these roles by HBC details must be included within the application to Court.

Before being appointed

a. 1.2 Representative

The Court may ask for a Witness Statement which provides information on the person's past and present wishes and feelings.

This is completed on the [COP24](#) form which includes:

- a.) Details of who you are including your relationship to the person subject to the application;
- b.) So far as possible:
 - i. The person's past and present wishes and feelings;
 - ii. Beliefs and values of the person that would likely influence their decisions if they have capacity;
 - iii. If you support the application and your reasons for doing so;
 - iv. Whether a formal hearing is required because the person wishes to see the Judge or take part in the proceedings;
 - v. Whether a formal hearing is required due to disputes concerning the arrangements, setting out the reasons for lack of support or opposition to the arrangements;
 - vi. Any comments about the person's capacity to make decisions about their own care arrangement; and

- vii. Any other comments in particular matters which will assist the Court to determine that the package of care and support is the least restrictive options available.

See:

Appendix One - Content of the Witness Statement; and

Appendix Two – How to draft the Witness Statement

b. Litigation Friend

The Court may ask for a Certificate of Suitability (Form N235) to be completed.

See: [Form N235: File a certificate of suitability to be a Litigation Friend](#)

4.6 Financial Assistance for Litigation Friend/1.2 Representative

Legal aid funding may be available for this support. Any funding would be to support the subject of the court proceedings (i.e. the cared for person) if they do not have the means to fund this themselves. This is normally accessed through a solicitor who has been instructed on behalf of a cared for person however the Social Worker supporting the case should take guidance from Legal Services, through the Legal Access Pathway (LAP) – See Section 6.

Court costs may be ordered against the 1.2 Representative/Litigation Friend where the individual in that role acts unreasonably or not in the person's best interests.

4.7 Ceasing to act as a Litigation Friend/1.2 Representative

This requires a further application to the Court using a [COP9](#) form.

If the person subject to the application dies the arrangement will end automatically.

If the person subject to the application is no longer deprived of their liberty HBC will inform the Court who will then order the Litigation Friend/1.2 Representative to be removed from their role provided the Court feels this is appropriate.

5. Application to the CoP for a community DoLS arrangement

Within Halton, where a need for a community DoLS is identified the appropriate care and assessment worker (usually a Social Worker) would complete the relevant forms to take forward an application to the Court of Protection. This can be done with the support of the Independent Adult Safeguarding Unit (IASU) and completed paperwork would then be sent on to the Council's Legal team for feedback and submission.

Those caring for the service user who is to be deprived of their liberty must be made aware of the Court of Protection charges related to application for a Welfare Order. It must also be considered that some cases are not straightforward, for example where the service user or another person objects to arrangements. For this reason the person, organisation or setting who is to be named as the Legal Guardian on the Welfare Order must be made aware that (unlike Deprivation of Liberty Safeguards that fall under section 21a of the Mental Capacity Act) there is no legal aid funding available for court proceedings under community DoLS arrangements.

The initial requirement for instigating a community DoLS process involves an assessment of capacity – See also: Section 8 of Halton Borough Council's [Mental Capacity Act 2005 Policy](#).

Where lack of mental capacity is established a letter must be issued to the GP of the person in receipt of care and support to inform them of the assessment and outcome – See the template in Appendix Three.

Where applicable an application to the CoP for a community DoLS arrangement would then follow on from assessment of capacity. This requires a [CoP3 Form: Make a report on someone's capacity to make decisions](#) to be completed.

From here the relevant social care professional would work through the 'DOLS – COP Checklist' on the Council's care file management system – CareFirst6.

The checklist requires further Court of Protection forms to be completed and saved to Electronic Social Care Records (ESCR). This includes:

- [COP24 – Witness Statement](#) – as set out in Section 4.5a and Appendix One and Two
- [COPDOL11 – Application to authorise a deprivation of liberty \(Section 4A\(3\) and 16\(2\) of the Mental Capacity Act 2005\)](#)

Once all paperwork is completed the case is presented to the Council's Legal team for submission.

6. Legal process

An application to the Court of Protection for a Community DoLS arrangement is processed, in Halton, through the Social Care Legal team.

Following assessment of lack of capacity and establishment of a need to submit an application for a community DoLS arrangement all relevant paperwork is completed with the support of the IASU. This can then be submitted to the Council's Legal team who will scrutinise the paperwork and feedback to the social care professional if further input is required or any additional information is needed.

Once the Social Care Legal team are satisfied that everything is in place they will prepare and submit court papers with the appropriate fees.

Where a case involves complications (for example, a disagreement on the care and support arrangements), and in particular where there needs to be Council representation at court proceedings, a LAP meeting may be convened.

This may be convened by the Legal team who will ask the social care professional referring the case to submit further details on the LAP forms. Alternatively it may be requested by the social care professional in foresight of the complexities of the case.

The LAP can be used to refer any adult social care case to Halton Borough Council's Social Care Legal team for support (and not just community DoLS applications). It involves consideration of prioritisation of the case and what level of involvement is required from Legal services. The process is set out in the Legal Access Pathway Policy.

For straightforward applications, once the Court Order is confirmed Legal services will notify the social care professional involved in the case.

Legal Services in Halton currently keep a tracking system to monitor the throughput of community DoLS applications. This should be used to monitor ongoing resource requirements. It will also serve as a documentation process to highlight complex cases back to the Adult Social Care Senior Management team to ensure they retain oversight of cases impacting on services.

7. Upon issue of a Court Order

Following issue of a Court Order authorising the community DoLS arrangements the social care professional supporting the case will:

- Hand deliver (where appropriate and practicable) the sealed Court Order to the relevant parties - including the service user subject to the deprivation, the care setting responsible for enforcing the deprivation, the 1.2 Representative or Litigation Friend, and any other relevant persons
- Update the CareFirst6 Checklist to reflect the legal status of the case.

The procedure for application to the Court of Protection for a community DoLS arrangement is further set out as a flow chart in Appendix Four.

8. Changes to a community DoLS arrangement

A community DoLS arrangement will come to an end if the subject of the deprivation dies. In relation to Halton Borough Council processes the usual 'deceased' notice must be captured against service user records on CareFirst6.

Section 4.7 sets out the processes for termination of a 1.2 Representative or Litigation Friend role.

Where there is an Order in place and changes to the care and support arrangements are proposed the Court of Protection must approve these changes. In the first instance this will involve a Legal Access Pathway (LAP) meeting being convened.

See also: Legal Access Pathway – Adult Social Care

If the loss of mental capacity was temporary and the cared for person regains capacity this change must also be approved by the Court.

9. Complaints process

Any complaint directly related to HBC process, procedure or personnel (involved in a community DoLS arrangement for an adult resident of the borough) should be made in-line with the [Resolving Complaints and Improving Services Policy](#).

Complaints about the arrangements themselves should be made via the Court of Protection on the [Form EX343A: Complaints Form](#)

Appendix One: Content of the Witness Statement

The Court will require a statement from the 1.2 Representative setting out the following issues:-

- a) P's¹ past and present wishes and feelings (and, in particular, any relevant written statement made by him/her when he/she had capacity);
- b) The beliefs and values that would be likely to influence his/her decision if he/she had capacity; and
- c) The other factors that he/she would be likely to consider if he/she were able to do so.

The information to include can be obtained from all or any of the following depending on the individual circumstances, from the 1.2 Representative:-

- a) Having prior knowledge of P;
- b) Speaking with others who know P;
- c) Meeting with P and speaking to him/her about the case and what their wishes are. Even if they lack capacity they may be able to respond with a wish or a feeling about the decision in respect of their care; and
- d) Speaking with people who live with or care for P, to try and find out if P's wishes and feelings can be ascertained from his/her behaviours, or whether P generally seems to be content with his/her care arrangements. They might also be able to say how the care plan works for P in practice.

Where relevant P's care plan should be known and understood and any issues highlighted to the court.

A Court of Protection Judge may not meet with P and so the information provided about P's wishes and feelings support any decisions made. Feedback from anyone else involved in P's life, including anyone who cares for him/her in their home, is very important in enabling the Court to ensure P is able to have their views, wishes and feelings heard.

If the Court of Protection grants the application there is likely to be an annual review where an updated Statement will need to be provided. This would deal with the same matters as previously which means others involved in P's care and life would need to again be approached for feed-in. This will sit alongside other information, based on the 1.2 Representatives view of care over the past 12 months.

¹ The reference to P is used by the Court of Protection as an easy way to refer to the family member or friend who is the subject of the application (the service user).

Appendix Two: How to draft the witness statement

The witness statement comes ready formatted and provides guidance on how to complete it.

The template can be found at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856361/cop24-eng.pdf

Page 1 – The 1.2 Representative would need to complete the details on box at the top right hand corner e.g. their name as witness; tick which number statement; the services user the statement is being filed on behalf of; and the date the statement is being made.

Page 1 – fill in the case number which will appear on the Application and correspondence received from the Court of Protection and/or Local Authority. Also include the full name of the service user (the same as in 'Filed on behalf of – name of party').

The social care assessor involved in the service user's case can support completion of this form.

Page 2 - Sections 1-3 are the 1.2 Representatives own details e.g. name, occupation and address.

Page 2-4 - Section 4 - In terms of the main body of the statement this should be numbered paragraphs and be clear and concise.

Page 4 – The 1.2 Representative would then need to sign and date the declaration before sending this to Court and sending a copy to any relevant parties (e.g. the Local Authority).

Appendix Three: Letter to GP – Unsound Mind Diagnosis



Letter to GP re
unsound mind diagn

Appendix Four: Halton Borough Council process for application to the CoP for a community DoLS arrangement

