



# COMPASSIONATE HEART

SERVICES WITH A DIFFERENCE

## Deprivation of Liberty Policy and Procedure

### 1. Purpose

**1.1** To protect the rights of people aged 16 and above in their own homes where they may be deprived of their liberty ensuring they are given the necessary care or treatment when they lack the capacity to consent to the arrangements involved

**1.2** To comply with the requirements of the European Convention Article/Human Rights Act 1998, 5(1)(e): '...No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law' and Article 5(4) 'Everyone who is deprived of his liberty... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

**1.3** To support Compassionate Heart Limited in meeting the Key Lines of Enquiry.

**1.4** To meet the legal requirements of the regulated activities that Compassionate Heart Limited is registered to provide:

- Coroners and Justice Act 2009
- The Care Act 2014
- Care Quality Commission (Registration) Regulations 2009
- Human Rights Act 1998
- Mental Capacity Act 2005
- Mental Capacity Act Code of Practice

### 2. Scope

**2.1** The following roles may be affected by this policy:

- Registered Manager
- Other management
- Administrator
- Care staff

**2.2** The following people may be affected by this policy:

- All Service Users aged 16 and over who may lack mental capacity to consent to arrangements needed to give them necessary care or treatment in their own homes

**2.3** The following stakeholders may be affected by this policy:

- Family
- Advocates
- Commissioners
- External health professionals
- Local Authority
- NHS
- Representatives

### 3. Objectives

**3.1** Service Users are not restrained except where this is necessary and proportionate, and are not deprived of their liberty without lawful authority.

3.2 Authorisations to deprive Service Users of their liberty, including their duration and any conditions, are incorporated into Care Plans, and notifications are made to the Care Quality Commission.

3.3 Before any Service User is deprived of their liberty, all practical efforts are made to avoid deprivation of liberty.

3.4 If a person might lack capacity to consent, all health and care interventions are carried out in accordance with the wider Mental Capacity Act (MCA), using the least restrictive options that can be found.

3.5 Compassionate Heart LTD and The Agency understand the MCA definition of restraint, minimise its use in a person-centred way, and record why it is in the person's best interests, as well as being both:

- Necessary to prevent harm to the person, and
- Proportionate to the likelihood of harm as well as the seriousness of that harm

3.6 Care Workers work within the framework of the Mental Capacity Act 2005, including around restraint and deprivation of liberty.

#### 4. Policy

4.1 In community services, such as supported living, shared lives schemes, extra-care housing and domiciliary care services, providing services to people aged 16 and over who lack capacity to consent to arrangements for giving them necessary care or treatment, when those arrangements may amount to a deprivation of liberty:

- The service follows guidance about what amounts to deprivation of liberty given in the 'Cheshire West' Supreme Court judgement **P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor [2014] UKSC 19** (See Underpinning Knowledge)

4.2 In community services such as supported living, shared lives schemes, extra-care housing and domiciliary care, or in any service where service users are aged 16 or 17:

- The service follows Supreme Court guidance (see 4.1 above) and understands how to gain lawful authority from the Court of Protection, for deprivation of liberty, where necessary, in settings where DoLS are not available

4.3 Compassionate Heart Limited works within the Mental Capacity Act 2005 and its Code of Practice.

4.4 Compassionate Heart Limited can demonstrate that it uses every practicable means to maximise the mental capacity of Service Users to make their own decisions in accordance with the Mental Capacity Act 2005 and its code of practice.

4.5 Compassionate Heart Limited can demonstrate its commitment to the reduction of restraint and avoidance of deprivation of liberty wherever possible.

#### 5. Procedure

5.1 All service providers working with people aged 16 and above who might lack mental capacity to consent to health or care interventions, work within the Mental Capacity Act.

5.2 If deprivation of liberty is authorised:

- Ensure the Service User and their relatives understand that the Authorisation has been given, and how they can challenge it with the help of an IMCA (Independent Mental Capacity Advocate)
- Record the end date, diarise a month earlier to consider whether a new Authorisation will be needed and apply to the Supervisory Body in good time
- Record who the Relevant Person's Representative is, and include them in discussions about how to maximise the person's decision-making and freedom as far as possible
- Notify the Care Quality Commission of the Authorisation request and its outcome
- Record any conditions and ensure that they are incorporated into the Care Plan
- If someone dies while subject to an Authorisation, notify the Supervisory Body; check with them whether, following an amendment to the Coroners and Justice Act 2009, it is necessary also to make a routine referral to the Coroner
- The forms to support any application are available here: <https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance>

**5.3** If deprivation of liberty appears necessary and proportionate, and unavoidable, notify the Commissioners and request them to amend the Care Plan to avoid deprivation of liberty if possible, and, where this is not possible, ask them to apply appropriately and in a timely way to the Court of Protection for authorisation.

**5.4** For services such as supported living, extra care housing or Shared Lives schemes, or for Service Users aged 16 or 17, the Deprivation of Liberty Scheme is not available: recognise that authorisation can only be given by the Court of Protection, and that application is made by the commissioning local authority or NHS authority (CCG)

**5.5** Keep full records of assessments, applications, discussions with the Service User and their relatives or friends, about deprivation of liberty, and actions taken to minimise its use.

**5.6** Be prepared for Court of Protection Appointed Assessors to visit the service. They will interview the person, view records, and may interview staff.

**5.7** Provide services within the framework of the MCA statutory principles (see the MCA Code of Practice).

**5.8** Know when and how to assess decision-specific and time-specific capacity, and who should carry out the assessment; record capacity assessments including efforts made to enable the Service User to make the decision for themselves.

**5.9** Know when and how to make best interests decisions on behalf of Service Users who lack mental capacity at the time a decision needs to be made; record who was consulted and, in particular, the wishes and feelings of the person.

**5.10** Recognise, record and minimise the use of restraint.

**5.11** If deprivation of liberty is suspected:

- Recognise, record and minimise the use of deprivation of liberty (as clarified by the Supreme Court ruling [2014] UKSC 19 and in CQC Briefing on Deprivation of Liberty ([www.cqc.org.uk/file/151837](http://www.cqc.org.uk/file/151837)))

## **6. Definitions**

### **6.1 Deprivation of Liberty 'Acid Test'**

- The Supreme Court 'Acid Test' clarifies that a person is deprived of their liberty if they:
  - Lack capacity to consent to the arrangements needed to give them necessary care or treatment
  - Are not free to leave (they may be allowed to go out with staff, or even alone, with permission, but may not go to live somewhere else, or without staff permission) and
  - Are subject to continuous (or continual) supervision and control. (A way to think about this is, do staff know all the time where someone is and what they are doing, and do staff provide and control their access to other people, activities, and the community?)

### **6.2 Court of Protection Authorisation Conditions**

- There are not always conditions attached to an Authorisation, but where they are imposed, the intention is to lessen the deprivation of liberty in some way, for example by saying the Provider must arrange taking the person out into the community regularly, or do their best to make it possible for relatives or friends to visit the person and, where possible and safe, take them out
- Conditions are part of the legal authorisation so must be complied with. If a Provider cannot comply with any condition, they should urgently contact the Commissioners of the service, to discuss the best way to proceed

### **6.3 Restraint**

- As defined by the MCA, the use, or threat, of force to make someone lacking mental capacity do something they are resisting, or restricting the freedom of movement of someone lacking mental capacity, whether the person resists this or not
- Restraint is only lawful if it is in the person's best interests: except in an emergency, best interests are worked out in accordance with the statutory checklist in MCA Section 4. (See MCA Code of Practice

Chapter 5). But it must also meet two extra conditions (see MCA Code of Practice 6.40 and following)

- The restraint must be **necessary** to prevent harm to the person, and a **proportionate response** to the likelihood and seriousness of that harm; it's intensity and duration must be as minimal as possible
- Restraint is considered part of a deprivation of liberty but individual restraints do not themselves constitute a deprivation of liberty, since deprivation of liberty is defined by reference to the entire Care Plan, and how it meets the 'Acid Test' (see 6.1 above)

#### **6.4 IMCA**

- The Mental Capacity Act 2005 introduced the role of the Independent Mental Capacity Advocate (IMCA). IMCAs are a legal safeguard for people who lack the capacity to make specific important decisions: including making decisions about where they live and about serious medical treatment options. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend, who is able to represent the person.

#### **Key Facts - Professionals**

Professionals providing this service should be aware of the following:

- Deprivation of liberty is sometimes a necessary and proportionate way to keep a person who lacks mental capacity safe
- The risk of deprivation of liberty must be recognised and its use removed, or reduced as far as possible, while preventing foreseeable harm to the person lacking mental capacity
- Its use is not lawful without an Authorisation having been sought from the appropriate body which, for community services such as supported living, extra-care housing, shared lives and domiciliary care, is the Court of Protection
- An Authorisation is only granted if the Court agrees that there is no less restrictive option to keep the person safe
- Authorisation provides protection from liability for staff who are depriving the person of their liberty
- The outcome of an Authorisation Request must be notified to the CQC
- Deprivation of liberty is governed under the MCA, so all recording must show compliance with the wider MCA, including the search for the least restrictive option to deliver services

#### **Key Facts - People Affected by The Service**

People affected by this service should be aware of the following:

- An Authorisation by the Court of Protection for someone to be deprived of their liberty is a way to protect the rights of people cared for in their own homes
- An Authorisation provides reassurance that the care is in the best interests of the person, and that no less restrictive option can be found to keep the person safe
- Authorisation allows the person, or their representative, to appeal to the Court of Protection for a decision about their mental capacity to decide how to live, or whether the Authorisation is in their best interests and the least restrictive option for their care
- There is no stigma attached to an Authorisation: it is a sign that the Provider is acting to protect the human rights of people who are vulnerable

#### **Further Reading**

As well as the information in the 'Underpinning Knowledge' section of the review sheet we recommend that you add to your understanding in this policy area by considering the following materials:

Care Quality Commission: Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 11: Need for consent <https://www.cqc.org.uk/guidance-providers/regulations-enforcement/regulation-11-need-consent>

Care Quality Commission: Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 13: Safeguarding service users from abuse and improper treatment <http://www.cqc.org.uk/content/regulation-13-safeguarding-service-users-abuse-and-improper-treatment>

All standard forms to use in relation to DOLS can be found here: <https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance>